IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CIVIL CASE NO. 3:23CV272-HTW-LGI

NAACP, MISSISSIPPI NAACP, JACKSON NAACP, DERRICK JOHNSON, FRANK FIGGERS, CHARLES TAYLOR MARKYEL PITTMAN, CHARLES JONES — PLAINTIFFS

AND

UNITED STATES OF AMERICA — PLAINTIFF INTERVENOR

VERSUS

SEAN TINDELL, COMMISSIONER OF PUBLIC SAFETY; BO LUCKEY, CHIEF OF THE OFFICE OF CAPITOL POLICE; CHIEF JUSTICE MICHAEL K. RANDOLPH; LYNN FITCH, ATTORNEY GENERAL — DEFENDANTS

CONSOLIDATED WITH

JXN UNDIVIDED COALITION, MISSISSIPPI VOTES, PEOPLES ADVOCACY INSTITUTE, MISSISSIPPI POOR PEOPLES CAMPAIGN, BLACK VOTERS, MATTER, RUKIA LUMUMBA, AREKIA BENNETT-SCOTT, DANYELLE HOLMES — PLAINTIFFS

VERSUS

SEAN TINDELL, COMMISSIONER OF PUBLIC SAFETY; BO LUCKEY, CHIEF OF THE OFFICE OF CAPITOL POLICE — DEFENDANTS

TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

SEPTEMBER 5, 2023
JACKSON, MISSISSIPPI

Exhibit 1

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THE COURT: Terri, call the case, please.

THE CLERK: Your Honor, this is National Association for the Advancement of Colored People, et al versus Tate Reeves et al, Civil Action Number 3:23cv272-HTW-LGI.

We are here this morning for a status conference, and at this time, we are going to ask all counsel to introduce themselves for the record, starting with the plaintiff.

MR. RHODES: Good morning, Your Honor. Carroll Rhodes, one of the counsel for the plaintiff, and I'm joined by Mr. Brenden Cline, Mark Lynch, David Leapheart, and Evan Walker-Wells.

THE COURT: Hi there. Good morning to all of you. Let's go to the second row.

MR. RUSS: Hello, Your Honor. My name is Bert Russ. I'm with the U.S. Department of Justice. And I'll let my colleagues introduce themselves.

MS. WILLIAMS: Good morning, Your Honor. Angela Williams with the U.S. Attorney's Office.

MS. PAIGE: Good morning, Your Honor. Mitzi Dease Paige with the U.S. Attorney's Office.

THE COURT: Good morning. All right.

MS. WU: Good morning, Your Honor. I'm Paloma Wu, counsel for the plaintiffs in the consolidated case, JXN Undivided Coalition versus Tindell. Thank you.

THE COURT: All right. Do I have everybody on this

side? Terri, was there somebody to whom you were sending a link?

THE CLERK: Yes, sir, I'm sending it now. They are not on the Zoom yet.

THE COURT: Okay. Now, on the other side, please.

MR. SHANNON: Good morning, Your Honor. Rex Shannon with the Mississippi Attorney General's office. I'm here with my co-counsel in the NAACP case, Gerald Kucia.

THE COURT: All right. Good morning to both of you.

MR. WILLIAMS: Good morning, Your Honor. Chad Williams with the Mississippi Attorney General's Office, and I have Wilson Minor here as well. We are in the consolidated case with Ms. Wu, and we represent Chief Luckey and Commissioner Tindell.

THE COURT: All right. Thank you. And good morning to both of you.

MR. NED NELSON: Good morning, Your Honor. Ned Nelson here, along with my co-counsel, Mark Nelson, for Chief Justice Randolph.

THE COURT: All right. Thank You. And Chief Justice, good morning to you.

CHIEF JUSTICE RANDOLPH: Good morning, Your Honor.

THE COURT: Now, then, Terri, am I still waiting on someone?

DEPUTY CLERK: Yes, I'm send it now. They should be

on shortly. Gary Guzy.

MR. RHODES: Your Honor, the person who is supposed to be joining by Zoom is also co-counsel for the plaintiff, Gary Guzy, but we are supposed to go ahead and get started without him, not necessarily wait on him.

THE COURT: Okay. And Terri, have you heard from him?

THE CLERK: No, sir, I didn't get a response. I just forwarded him the link to get on Zoom.

THE COURT: So Mr. Rhodes, you say we can proceed without him?

MR. RHODES: Yes, Your Honor.

THE COURT: Okay, then. I will proceed.

There are a number of cases -- excuse me, motions that are pending in this case. There's the motion for interrogatory restraining order, Docket Number 11. There's a renewed motion for a temporary restraining order, Docket Number 24. There's a motion for a preliminary injunction regarding the appointment of judges, and that's Docket Number 40. Then there is a motion to clarify the June 1st, 2023 order on judicial immunity, Docket Number 51; a motion for a certificate of appealability by Chief Justice Randolph, Docket Number 54; unopposed motion for leave to file excess pages, Docket Number 56; motion to intervene, Docket Number 69; motion to amend complaint, Docket Number 80; motion for a temporary restraining order, Docket

Number 82. Now -- oh, and yes, there's a motion to expedite discovery, Docket Number 91.

First of all, relative to these motions that have been filed, are there any deletions or abandonments of any of these motions, or are all of these motions still pending? Yes?

MR. CLINE: Yes, Your Honor. I can speak to that.

THE COURT: Now, whenever someone stands to address, would you please identify yourself so that we have a complete record of all who are speaking. Go right ahead.

MR. CLINE: Yes. Brenden Cline with plaintiffs.

So Your Honor, plaintiffs' position is that if Your Honor takes three actions today, it can dispose of all the pending motions, and some of the later filed motions will render some of the earlier filed motions moot or will resolve them.

THE COURT: Check to see if your mic is on.

MR. CLINE: Yes, it is. Sorry. I can lean forward.

THE COURT: Well, if you want to, why don't you go to the podium, and it will be easier if you go to the podium.

MR. CLINE: So plaintiffs have filed more recent motions, Your Honor, that would render some of the earlier filed motions moot or would otherwise resolve them. So our position is if Your Honor takes three actions today, granting the motion for leave to amend, granting this replacement TRO against the John Doe defendants --

THE COURT: One second. Hold it. Motion to amend.

All right. That motion was filed August 3rd, 2023?

MR. CLINE: That's right.

THE COURT: Okay. That was number 8 on the list I read. All right. Go ahead.

MR. CLINE: And ECF, I believe it was 82, that new TRO motion against John Doe defendants named in that amended complaint.

THE COURT: That would be -- that's the motion also filed on August 3rd, 2023.

MR. CLINE: That's right.

THE COURT: Okay.

MR. CLINE: And the final issue would be that very last motion, ECF 91, ordering discovery to start in the case.

THE COURT: Motion to expedite discovery. That's correct?

MR. CLINE: Yes, sir.

THE COURT: Filed on August 18, 2023.

MR. CLINE: That's right.

THE COURT: Okay. So now, what is then your statement relative to these three motions as they impact on all the other outstanding motions?

MR. CLINE: So motion by motion, they would resolve some of the earlier filed ones. For example, the motion for leave to amend, our position is that that would resolve the motion for clarification and the Chief Justice's motion for the

54(b) certification.

THE COURT: Okay. Hold it. Motion for clarification that was filed on June 5, 2023?

MR. CLINE: I believe so, yes.

THE COURT: And that docket number is 51?

MR. CLINE: 51. That's right.

THE COURT: Next. Keep going.

MR. CLINE: The first two TRO motions Your Honor mentioned, those have been granted previously.

THE COURT: So you are saying they are not before the Court now?

MR. CLINE: That's right.

THE COURT: Okay. So that's Docket Number 11 and Docket Number 24 for motions that were filed respectively on April 28th, 2023 and May 11, 2023. You said they are not before the Court now?

MR. CLINE: That's right.

THE COURT: Okay.

MR. CLINE: And I believe the final one would be the pending motion for preliminary injunction against the Chief Justice.

THE COURT: For the appointment of judges?

MR. CLINE: That's right.

THE COURT: Docket Number 40. And that was filed on May 24, 2023.

MR. CLINE: Yes, Your Honor.

THE COURT: Okay. Now, you are saying that motion is still outstanding, correct?

MR. CLINE: It is still outstanding, but our position, as we will explain today is that if Your Honor grants the replacement TRO against these new John Doe defendants, who are those judges who the Chief Justice will appoint, that once that replacement TRO is entered, the Court can lift the existing TRO restraining the Chief Justice from issuing those appointments, and then plaintiffs can withdraw that pending preliminary injunction motion directed to the Chief Justice, and we can proceed on that TRO and proceed to have a hearing on the TRO being converted into a preliminary injunction against the Doe defendants based on that preexisting briefing.

THE COURT: Okay. Thank you so much.

MR. CLINE: Okay.

THE COURT: I will come back to you in moment. Now, with regard to these motions that you have identified that are still before the Court, will you be making the argument on those motions?

MR. CLINE: Yes, Your Honor. If I may introduce the team and who we plan to have cover which issue.

THE COURT: Okay.

MR. CLINE: So first, I would plan to cover the issues concerning the Chief Justice, so specifically the

section of the motion for leave to amend the complaint that concerns those claims against the Chief Justice. This is HB 1020, Section 4, for the CCID court, and HB 1020, Section 1, for declaratory relief only.

And then I would hand it over to my colleague, Mr. Mark Lynch. He would plan to cover the remainder of the motion for leave to amend, specifically with regard to these John Doe judge defendants, who are not yet judges, who are currently just private citizens who have not yet been appointed. Mr. Lynch would cover that section of that, motion for leave to amend and the TRO motion.

And if Your Honor would like argument on the merits of the TRO motion, which are the same as the merits of the prior TRO motions that Your Honor already granted, Mr. Rhodes could cover that today.

Then we would proceed to have -- if the Court is agreeable, we could have Mr. Leapheart finally address the motion to start discovery in the case.

THE COURT: Okay. Let's see. All right. Thank you very much. Anyone else on this side of the aisle need to address the Court on these potentially outstanding motions?

MR. RUSS: Your Honor, Bert Russ for the U.S. Department of Justice. The motion to intervene, which you mentioned, is apart from the other motions and would need to be addressed separately from those.

THE COURT: All right. And let me get back over here to that one. That was on number 7 on my list. That was filed July 12, 2023.

MR. RUSS: Yes, Your Honor.

THE COURT: Docket Number 69. And this motion is opposed by the other defendants. And who will be arguing that motion?

MR. RUSS: I will, Your Honor.

THE COURT: Thank you so much. I will come back to you. Now let me go to the other side of the aisle. Good morning again.

MR. SHANNON: Good morning, Your Honor. Rex Shannon with the Attorney General's Office for the state defendants.

THE COURT: All right. Do you agree with the recitation of motions that I mentioned earlier?

MR. SHANNON: Yes, Your Honor, I believe that is an accurate representation of the pending motions.

THE COURT: And are there any additional ones, to your knowledge?

MR. SHANNON: Not to my knowledge, Your Honor. Give me a moment to think. I believe the Court has covered all of the outstanding motions and recitations at this point. And the four from the folks on the other side have said that would need to be heard today, the state defendants have opposed, filed written oppositions to all four those motions.

THE COURT: Who will be arguing on your side?

MR. SHANNON: I will, Your Honor.

THE COURT: On all of them?

MR. SHANNON: Yes, Your Honor.

THE COURT: Thank you so much.

MR. SHANNON: Thank you, Your Honor.

MR. NED NELSON: Good morning, Your Honor. Ned Nelson for the Chief Justice. Can you hear me all right?

THE COURT: I can. Thank you.

MR. NED NELSON: Your Honor, the only motion that the Chief Justice has filed in this matter is the motion for 54(b), certification of appealability. I believe that was entered --

THE COURT: June 9, 2023.

MR. NED NELSON: Yes, sir, as Docket Number 54.

THE COURT: That is correct.

MR. NED NELSON: Any response to the plaintiffs' motions will be handled by me, as well as the arguments for the 54(b) certification.

THE COURT: Okay, then. All right. Then -- thank you so much.

Now, did I miss anything from anybody? All right. The answer appears to be no.

I'm going to start with this motion to intervene. Are you ready to start?

MR. RUSS: Yes, Your Honor.

THE COURT: Please go to the podium.

MR. RUSS: Hello, Your Honor. My name is Bert Russ with the U.S. Department of Justice. We have a motion to intervene in this case pursuant to Section 902 of the Civil Rights Act. Section 902 allows the U.S. Department of Justice, the United States, to intervene in cases involving violations of the Equal Protection Clause on the basis of race and some additional categories.

We are not seeking to relitigate issues that have already come before the Court. We filed our motion to intervene less than three months after the law was signed. We believe our motion is timely.

The defendants have raised a few issues in their opposition brief that I just wanted to address. Many of the cases that they cite in their opposition brief involve private plaintiffs versus the United States, not -- that don't involve the United States, or if they do involve the United States, they often do not involve Section 902.

The cause of action here is under the Fourteenth Amendment, and Section 902 of the Civil Rights Act is the statutory authority Congress has given us to be able to enter this case in intervention.

One of the other arguments that defendants have raised is that they mention abrogation of sovereign immunity. Many of those cases involve private plaintiffs suing states where that

is an issue. We cite some cases, the *Franchise Tax Board* case before the U.S. Supreme Court, the matter of *Fernandez* before the Fifth Circuit, that have recognized that the United States can sue states in federal court that went -- as part of being the federal system, states give up some of their sovereign immunity, allowing the United States to bring suit.

The United States interests here are ensuring that the residents of Hinds County are free from discrimination under the Equal Protection Clause. We have brought a number of cases under 902, most recently the *LW* case in the Middle District of Tennessee, where the Court recognized we had an intervention as a right and that we could bring additional relief beyond that of the original plaintiffs.

I would also add in the *Pasadena School Board* case before the U.S. Supreme Court. The Supreme Court recognized that the United States can continue a case even if the original plaintiffs were not in the case. So we believe it is appropriate for us to be in the case and that the Court should grant our motion to intervene. I'm happy to answer any questions the Court has.

THE COURT: Of the cases that you've cited, what is your best case?

MR. RUSS: The best case -- there are several that I would point to. I think on the question of the United States being able to sue states, I would look at the *Franchise Tax*

Board case, 139 S. Ct. 1485 decided in 2019. Some other cases that I would cite, that *LW* case, and let me find the citation for you, Your Honor. This was a decision in the Middle District of Tennessee decided in May of this year where the Court recognized -- that was on the basis of sex. Section 902 includes race, sex, color, national origin. And *LW*, the citation is in the Westlaw 2023, Westlaw 3513302, again, Middle District of Tennessee.

The last case I might cite is an older case from the Southern District of Mississippi, *Coffey v. State Educational Finance Committee*, 296 F. Supp. 1389, Southern District of Mississippi, that allowed the United States to intervene under Section 902 and seek relief against the State of Mississippi.

THE COURT: And should the Court allow you to intervene, then on what side would your arguments primarily fall?

MR. RUSS: Primarily on the plaintiffs' side, Your Honor.

THE COURT: So then your argument would be what?

MR. RUSS: Our argument is that the HB 1020 making changes to the criminal justice system in Hinds County and the City of Jackson did so in a way that violates the Equal Protection Clause. There are three provisions particularly we are challenging: The appointment of the temporary circuit judges; the appointment of the CCID, the special district

that's being created; the appointment of the judge there and the appointment of the prosecutors. It is our belief that Hinds County and the residents of Hinds County, which, you know, 70 to 80-percent African American, are being treated differently than other parts of the state in the way the state legislature has restructured the criminal justice system, taking their voice away.

Usually circuit judges are elected, and this change with HB 1020 would mean that over half and maybe more of the circuit judges are appointed, and by officials where, in light of polarized voting in the state, the residents of Hinds County really do not have a meaningful voice. They are not going to have a meaningful voice over the criminal justice system. So that is the heart of our equal protection claim that we are pursuing in this case.

THE COURT: Previously this Court determined that Chief Justice Randolph enjoys judicial immunity. You did not mention that you would also be addressing that. Would you?

MR. RUSS: So the defendants that we have named in our proposed complaint and intervention do not include the Chief Justice. They include the State of Mississippi and the Attorney General. We believe that if the State of Mississippi is included as a defendant, that any state officials, if the State of Mississippi were enjoined, for example, from appointing temporary judges, that that would bind other state

officials, even if they are not explicitly named.

We saw -- of course, we read your prior ruling on the Chief Justice. We did not name the Chief Justice as a defendant, and we didn't want to revisit any prior rulings that your Court has made on that issue.

THE COURT: So then relative to this dispute as to whether he can make appointments, then you would not be weighing in on that determination?

MR. RUSS: Not the pending motions today, Your Honor. We were mindful in intervening not to upset what has come before. We wanted to not prejudice anybody. We wanted to be timely. And so we have not taken the position on the prior motions regarding the Chief Justice.

THE COURT: So then how would your intervention be structured in argument where you are saying that you would be aggrieved over the appointment of these special circuit judges, but you are not seeking to enjoin the Chief Justice from doing so?

MR. RUSS: That is correct. We believe that if the state were enjoined, that it would affect state officials as well, without having to name each of the state officials.

THE COURT: In other words, what you are saying is that your motion would be an end around judicial immunity. Is that it?

MR. RUSS: I might not describe it as an end around.

It would bind the state, and then anyone who is part of the state would be bound by it as well. So we weren't trying to revisit the Court's earlier ruling on judicial immunity.

THE COURT: Well, I'm still a bit confused.

MR. RUSS: Okay.

THE COURT: You are saying that you are not naming the Chief Justice?

MR. RUSS: That is correct.

THE COURT: And that you do not have -- you would not anticipate any direct attack on the Chief Justice's ability to name judges. Is that so?

MR. RUSS: That is correct, not a direct. That is correct.

THE COURT: But you are saying that you would have an indirect attack by naming the State of Mississippi and enjoining the State of Mississippi from appointing these judges even though the appointing agent himself enjoys judicial immunity?

MR. RUSS: That is correct, Your Honor. When we brought cases, and we have some examples in I think footnote 6 of our reply brief, we usually sue the state, which sometimes includes state officials as well, but we sued the state to make sure we could get all of the relief that we potentially could need.

I am aware that the private plaintiffs with their amended

complaint have named additional individuals, the Doe defendants and others, that might also get at this question of the appointments without including the Chief Justice. And so we don't have a view one way or the other about if you allow them to amend their complaint and they have these additional defendants. We don't have a view on that. That is maybe another way also to make sure that judges aren't appointed under this statute until a decision can be made on the merits.

THE COURT: Thank you. I will come back to you on this matter of amendment.

MR. RUSS: Thank you, Your Honor.

THE COURT: And this matter of intervention.

Now, I'm not going to get further into your argument here because the Court first has to make a determination whether you can intervene.

MR. RUSS: Yes, Your Honor.

THE COURT: Do you challenge any opposition on your motion to intervene?

MR. RUSS: We do not agree with the arguments made in the opposition brief, and we had filed a reply brief responding to those.

THE COURT: All right. Thank you. Let's stay over here for a moment on the plaintiffs' side. Is there any opposition to this motion to intervene?

MR. RHODES: Not from the NAACP plaintiffs, Your

Honor.

THE COURT: Okay. So then there are no voices in opposition on this side of the aisle; is that correct?

MR. RHODES: Yes, Your Honor, I believe you did announce on the bench earlier that you were allowing the JXN Undivided to intervene. I don't know if they have any opposition, but from the NAACP plaintiffs, from the original plaintiffs in the case, there is no opposition.

THE COURT: All right.

MS. WU: Your Honor, the JXN Undivided Coalition plaintiffs don't have any opposition to the pending motion to intervene by the Department of Justice.

THE COURT: All right. Thank you so much.

So then hearing no opposition on this side of the aisle, I turn now to the other side. I will start with you, Mr. Shannon.

MR. SHANNON: Yes, Your Honor. Rex Shannon.

THE COURT: Could you go to the podium, please.

MR. SHANNON: Yes, Your Honor.

Good morning again, Your Honor. Rex Shannon with the Attorney General's Office for the state defendants.

Yes, Your Honor, the state defendants oppose the motion and have filed a written response in opposition. I will be happy to present those arguments here this morning orally.

THE COURT: Go right ahead.

MR. SHANNON: Thank you, Your Honor.

Your Honor, the state defendants submit that the motion should be denied outright because it's untimely, number one. Alternatively, Your Honor, the motion should be denied to the extent it seeks to add the State of Mississippi as a defendant, and further to the extent the government seeks to assert claims against the Mississippi Attorney General.

For one thing, Your Honor, the government lacks standing to assert an equal protection claim against the State of Mississippi or the Attorney General. Additionally, Your Honor, the Department of Justice has no cause of action to enforce the Fourteenth Amendment against the State in connection with House Bill 1020.

At a minimum, Your Honor, this Court should deny any attempt to join the State of Mississippi as an additional defendant in this case.

Your Honor, all of the claims that the plaintiffs have asserted against the named defendants, as Your Honor knows, are Fourteenth Amendment equal protection claims. In filing the motion to intervene, the government seeks to assert the same equal protection claim it's own right against the Attorney General. The government is further seeking to add the State of Mississippi as an additional defendant and to assert the Fourteenth Amendment equal protection claim against the State itself relative to House Bill 1020.

First of all, Your Honor, the motion to intervene should be denied outright because it is untimely. Whether the government seeks intervention of right or permissive intervention makes no difference where timeliness is concerned. Intervention of right here is governed by Rule 24(a) and 42 U.S.C. Section 2000h-2. Permissive intervention is governed by Rule 24(b). All of those authorities mandate that timeliness is a necessary prerequisite to intervention.

Your Honor, in evaluating timeliness in this context, the Fifth Circuit requires the District Court to consider four factors. I will briefly walk through each one of those in turn.

The first factor is the length of time that the would-be intervenor actually knew or reasonably should have known of its interest in the case before it petitioned for leave to intervene. Your Honor, the government has known of its purported interest in this case since at least as early as February the 22nd of this year. That's when Congressman Bennie Thompson disclosed that he had been discussing House Bill 1020 and possible civil rights concerns with the U.S. Department of Justice. We have attached an article from WLBT confirming that. That means DOJ has been aware of House Bill 1020 for at least as long as two months prior to its enactment. The government, I don't believe, disputes that.

House Bill 1020 was signed into law on April 21st of this

year. That same day, Your Honor, the plaintiffs in this case filed their 51-page 149-paragraph complaint initiating this litigation. There's no question that plans were underway to sue certain State defendants over House Bill 1020 even before it was signed into law by the governor.

As Your Honor knows, almost everything about this case has received widespread media attention. There is no way DOJ can say that it didn't know or shouldn't have known about this litigation since its inception. And I don't believe they are saying that. Yet instead of intervening in this case at the outset, Your Honor, DOJ sat by while the parties duked it out over various motions over the course of three lengthy hearings before Your Honor earlier this spring and then in early summer.

As Your Honor will recall, between April and June, Your Honor, the parties engaged in extensive briefing on numerous motions. We had three lengthy hearings, as I say. Prior to today, we had a subsequently filed lawsuit get consolidated with this case. And most significantly, Your Honor, the plaintiffs and Chief Justice Randolph, as Your Honor is well aware, fought a hot battle over judicial immunity which this Court resolved in the Chief Justice's favor, dismissing him from this case.

The DOJ has undoubtedly been aware of House Bill 1020 since its infancy in the legislature. Surely they have been following this litigation ever since suit was filed. It was

not until, Your Honor, this Court dismissed Chief Justice Randolph that DOJ apparently decided it was necessary to intervene, almost certainly because the plaintiffs finally appreciated that the dismissal of the Chief Justice foreclosed any avenue to relief on their judicial appointment claim. If the government really thought there was any good reason to intervene in this case, they should have made it at the outset. The government made no effort to show why that didn't occur. And for all of these reasons, the first factor we submit with respect, Your Honor, weighs against intervention.

The second factor is the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to seek intervention as soon as it reasonably knew or should have known of its interest in this case. Your Honor, allowing the government to intervene at this point we submit would prejudice the State defendants by further prolonging a resolution of plaintiffs' judicial appointment claim.

Your Honor, the TRO entered against Chief Justice Randolph in May currently remains in effect for going on 116 days, which is 88 days longer than the 28-day period authorized by Rule 65. Chief Justice Randolph, Your Honor, was dismissed on June 1st of this year. The plaintiffs' motion for preliminary injunction has been fully briefed and awaiting disposition since June 9th. Your Honor, allowing the United States to

intervene at this late date will almost certainly invite additional briefing on additional issues and more hearings. It is a virtual certainty that DOJ's intervention will further delay resolution of the judicial appointment issue, thereby prejudicing the interest of the State defendants. Thus, Your Honor, we submit the second factor likewise weighs against intervention.

The third factor, Your Honor, is the extent of the prejudice that the would-be intervenor may suffer if intervention is denied. Your Honor, the government won't suffer any prejudice if its motion is denied. And the plaintiffs in this case, Your Honor, have the financial backing of the NAACP. They are represented by a team of highly skilled attorneys, including a former U.S. Attorney General. There is no reason to believe that the plaintiffs' rights won't be zealously protected by their own lawyers in this case.

Your Honor, DOJ says it needs to be in this case to protect what it calls the government's sovereign interest in ensuring that all citizens will be afforded equal protection of the laws in accordance with the Fourteenth Amendment. But, Your Honor, under the government's reasoning, any ruling that this Court makes that favors the plaintiffs would ostensibly inure to the benefit of the United States. There is no reason to believe that the rights of citizens at large will somehow be prejudiced by any ruling that Your Honor makes in this case

unless DOJ is a party.

Your Honor, in support of the argument on prejudice, DOJ has cited the *Cooper* case and the *General Telephone Company* case. Your Honor, *Cooper* doesn't address intervention or prejudice, nor does it directly speak to any sovereign interest to the United States. The *General Telephone Company* case says that the public interest is vindicated when the EEOC acts at the specific behest of individuals, specific individuals, by filing suit on their behalf. Your Honor, that case has no application here where the plaintiffs are already represented by counsel. Their interests are ostensibly aligned with what DOJ purports to be the interest of all citizens.

DOJ has made no showing of any actual prejudice to the United States Government if it is not allowed to be a plaintiff in this case. Given the absence of any prejudice to the government, Your Honor, we submit that the third factor likewise weighs against intervention.

The fourth and final timeliness factor, Your Honor, is the existence of unusual circumstances militating for or against intervention. Your Honor, here the whole point of House Bill 1020's judicial appointment provision is to relieve the judicial backlog of criminal cases in Hinds County. Your Honor has previously found that, and I quote, The criminal justice system in Hinds County is in crisis, end quote. The State has a legitimate interest in reducing overcrowded criminal dockets

in Hinds County.

Your Honor, House Bill 1020's judicial appointment provision is critical to ensuring that both crime victims and criminal defendants alike both have timely access to justice in Hinds County's criminal court system. Your Honor, at this juncture, DOJ's belated intervention would only prolong any assistance to Hinds County that is to result from the appointment of temporary special circuit judges.

Your Honor, these unusual circumstances militate against intervention. I would point out that the government has not identified any unusual circumstances militating in favor of intervention. Therefore, Your Honor, we submit that this fourth and final factor likewise weighs against granting the motion to intervene.

Your Honor, it is fairly obvious that this belated motion to intervene is an attempt to circumvent this Court's dismissal of the Chief Justice by suing the State of Mississippi. The plaintiffs know they can't sue the State. For one thing, the State is not a person amenable to sue under Section 1983.

Your Honor, additionally, any claims that the plaintiffs could make in this case would be barred by sovereign immunity, as far as claims against the State of Mississippi. But as I will discuss momentarily, Your Honor, the State of Mississippi is no more amenable to suit by DOJ in this case than it is by the plaintiffs. If DOJ truly believed that its intervention

was necessary in this case for any purpose, Your Honor, it should have sought intervention at the beginning of this case and before this Court and the parties expended considerable resources litigating this case and litigating key issues in this case.

Your Honor, the interests of the plaintiffs and DOJ are ostensibly aligned. The government's dilatory intrusion in this matter we submit would do nothing to further this Court's consideration of the issues. For all of these reasons, Your Honor, the United States' motion to intervene is untimely and the State defendants submit should be denied in its entirety.

Shifting gears, Your Honor, if the Court finds that the motion is timely, the motion, we submit, should nevertheless be denied in part because the government lacks standing and has no cause of action against the State of Mississippi.

First of all, Your Honor, the government lacks standing to assert an equal protection claim against the State or the Attorney General in connection with House Bill 1020. The Supreme Court has held that an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond what the plaintiffs in the case are seeking. That's the *Town of Chester* case, the *Little Sisters* case we cited in our brief.

Your Honor, in the cases before Your Honor today, the plaintiffs didn't sue the State of Mississippi. Therefore,

they are not seeking any relief against the State. DOJ, on the other hand, Your Honor, is attempting to add the State as a defendant and to pursue declaratory and injunctive relief against the State. That means that pursuant to *Town of Chester*, DOJ is required to separately demonstrate Article III standing.

Your Honor, to establish standing, DOJ has to show some injury in fact that is both concrete and particularized, as well as actual or imminent and not merely conjectural or hypothetical. Your Honor, there is no way that DOJ can make that showing here because the enactment of House Bill 1020 does not injure the federal government at all.

Your Honor, as we cited in our brief, merely disagreeing with the State regarding the constitutionality of House Bill 1020 is not an injury sufficient to confer Article III standing. Your Honor, that's the *Valley Forge Christian College* case that we cited in our brief.

DOJ has not even attempted to articulate any concrete actual injury to the United States caused by House Bill 1020. Instead, Your Honor, they say that this case, and I will quote, implicates the United States' ability to protect its sovereign interest in ensuring that persons of all races are afforded equal protection of the laws in accordance with the Fourteenth Amendment, end quote.

Your Honor, House Bill 1020 is no threat to the sovereign

interest of the United States Government. This purported sovereign interest that DOJ is advancing in truth is nothing more than an attempt to vindicate the plaintiffs' personal claims. Your Honor, as we've cited in our brief, a sovereign cannot merely act as a volunteer to litigate personal claims of its citizens. That's the *Pennsylvania v. New Jersey* case that we cited. Nor may a sovereign step in to represent the interest of particular citizens for any reason. That's the *Alfred L. Snapp & Son* case we have cited.

Furthermore, Your Honor, as I will discuss momentarily, importantly, Congress has not authorized a cause of action for the U.S. Attorney General to enforce the Fourteenth Amendment against the State of Mississippi in connection with this bill. Your Honor, the State defendants submit that this fact alone precludes the government from establishing standing in this case. We cited *U.S. v. City of Philadelphia* and *U.S. v. Solomon*.

Your Honor, in its reply brief, DOJ failed to cite a single case supporting the proposition that it has standing to sue in connection with House Bill 1020 under a sovereign interest theory or otherwise. In fact, Your Honor, the only authority that DOJ cites with respect to standing are several excerpts from the Congressional record in discussing 42 U.S.C. Section 2000h-2, which is the intervention statute that DOJ is traveling under here.

But, Your Honor, it's settled law in the Fifth Circuit that a court cannot consider legislative history in construing a statute that is unambiguous on its face. In fact, just last year, Your Honor, the Fifth Circuit reaffirmed that, quote, The Supreme Court has repeatedly and emphatically rejected the use of legislative history where the text is unambiguous, end quote. In so doing, Your Honor, the Fifth Circuit reiterated that, quote, No amount of legislative history can defeat unambiguous statutory text, end quote. That case is *United States v. Palomares*, 52 F.4th 640.

Your Honor, the plain language of Section 2000h-2 is unambiguous. That statute allows for intervention, period. It says nothing that can remotely be read as exempting the government from establishing standing to assert independent claims in a case in which it intervenes. Your Honor, therefore, this Court is precluded from considering any of the legislative history that is cited in DOJ's reply brief.

Your Honor, the United States cannot make the requisite showing to establish Article III standing against the State of Mississippi or against the Attorney General. Thus, it cannot assert claims against the State or the AG in this case. Your Honor, therefore, if for no reason -- if for any reason the Court finds that intervention is timely, the motion should nevertheless be denied to the extent the government seeks to add the State of Mississippi as a defendant or to assert claims

against the Mississippi Attorney General.

Moving on, Your Honor, even if the Court finds that the government has standing, Your Honor, the State defendants submit that the motion should nevertheless be denied, to the extent DOJ seeks to add the State of Mississippi as a defendant, the reason being DOJ has no cause of action against the State of Mississippi.

Your Honor, the government is attempting to sue the State to enforce the Fourteenth Amendment in connection with House Bill 1020. But Your Honor, the Fourteenth Amendment does not supply a generalized cause of action whereby the government can sue on behalf of its citizens, nor does the Fourteenth Amendment authorize the federal executive or the federal judiciary to create causes of action to enforce the Fourteenth amendment.

Your Honor, as we have set out in our brief, even traditional principles of equity cannot be used as a source of judicial power to create a cause of action here. Instead, Your Honor, the Fourteenth Amendment gives Congress the exclusive authority to create causes of action to remedy alleged violations of the Fourteenth Amendment.

Federal courts have recognized a Congressional policy denying the federal government broad authority to initiate enforcement actions whenever a civil rights violation is alleged. That is the *Mattson* case that we have cited in our

brief.

Your Honor, when Congress has acted to create causes of action entitling the federal government to sue to enforce the Fourteenth Amendment, it has conferred that power only sparingly. For instance, Your Honor, the federal government has authorized the U.S. Attorney General to sue state entities that enforce racially segregated public facilities. That is 42 U.S.C. Section 2000b-8. Congress has also authorized the U.S. Attorney General to sue State entities that maintain racially segregated schools. That is 42 U.S.C. 2000c-6A.

Your Honor, both of these statutes impose multiple pre-conditions that must be satisfied before the U.S. Attorney General is authorized to sue a State entity. The government has not pointed to a single statute authorizing it to sue a state over a crime reduction statute like House Bill 1020.

Your Honor, to the extent DOJ would argue that it has an implied cause of action to sue the State, that argument doesn't work either. Your Honor, any notion of an implied cause of action to enforce the Fourteenth Amendment was rejected by the Third Circuit in ***United States v. City of Philadelphia***, 644 F.2d 187.

The key point, Your Honor, is that Congress has not expressly created a cause of action that specifically authorizes the U.S. Attorney General to sue states over allegedly unconstitutional crime reduction statutes, like House

Bill 1020.

Your Honor, DOJ takes the position that a cause of action is created by 42 U.S.C. Section 2000h-2, the intervention statute. But, Your Honor, that is just simply wrong. For one thing, Section 2000h-2 only authorizes intervention. It does not contain any language authorizing an independent cause of action. Your Honor, Section 2000h-2 says that the U.S. Attorney General can intervene upon timely application in a pending action asserting Fourteenth Amendment equal protection claims predicated on race. It also says the Attorney General, the U.S. Attorney General can pursue, quote, the same relief as if it had instituted the pending action.

Your Honor, multiple courts have recognized this Section 2000h-2, the intervention statute, merely provides a process for the U.S. Attorney General to intervene in equal protection civil rights actions. It does not create an independent federal claim. Your Honor, we have cited the *Kennedy* case from the Southern District of Alabama to that effect. We have also cited the Sayman case from the Northern District of Illinois for the same proposition.

Your Honor, it is clear from the plain language of Section 2000h-2 that this statute does not create a cause of action. Your Honor, it is true that federal courts have taken different views on whether Section 2000h-2 limits DOJ to the precise relief requested by the plaintiffs in the pending underlying

action. Some courts have said that it does. Others, like the courts in *Spangler* and *the Sanders* cases, have said that it does not. But, Your Honor, whether or not Section 2000h-2 allows DOJ to exceed relief requested by the plaintiff is a different question entirely from whether that statute creates a cause of action.

Your Honor, even in the *Spangler* case, which the plaintiffs cite -- excuse me, which DOJ cites, the Ninth Circuit quite obviously in that case recognized that DOJ still needed an independent cause of action to seek relief under the intervention statute. DOJ cites *Spangler* and *Sanders* in support of their position, but Your Honor, neither one of those holds that the intervention statute creates a cause of action in the federal government.

The government argues, Your Honor, that unless this statute is read to create a cause of action, that it will be rendered meaningless, but Your Honor, that is simply not the case. For instance, I mentioned the federal statute that creates a cause of action for the government to enforce school desegregation. The government can initiate a lawsuit in the first instance pursuant to that school desegregation statute. What Section 2000h-2 does is it permits the government to intervene in an equal protection action that is already filed and pending, allowing the government to assert the cause of action created by the school desegregation statute in the

pending action. So it's not correct to say that the intervention statute is rendered meaningless unless it is read to itself independently create a cause of action. That is simply not the case.

Your Honor, counsel for the United States mentioned the *Coffey* case from 1969. Your Honor, in that case, the federal government intervened pursuant to Section 2000h-2 enjoining the State of Mississippi as a defendant. But Your Honor, the issue of whether Section 2000h-2 creates a cause of action against the State was not before the Court in the *Coffey* case. As far as we can tell, it was not raised.

Additionally, Your Honor, in *Coffey*, an arm of the State was already made a defendant by the private plaintiffs in that case. Regardless, Your Honor, subsequent case law makes it clear that when properly analyzed, any claim by private plaintiffs against the State of Mississippi would be precluded by Section 1983 and would likewise be barred by sovereign immunity. We have cited the *Will* case and the *Duncan* case, both of which stand for the proposition that the State is not a person under Section 1983. Therefore, the State cannot be sued by a private plaintiff under 1983. We have also cited *Alabama v. Pugh*, along with the *McCardell* case and the *Briggs* for the proposition that sovereign immunity bars any private suit against the State or state entity in federal courts without the State's consent. Your Honor, those precepts were not applied

in *Coffey*. Had they been, the State would have never been a party to begin with in that case. Thus, Your Honor, we submit the *Coffey* case is no help to DOJ.

The only other cases that were cited by DOJ, Your Honor, are *LW ex rel Williams* and the *Marcaida* case and the *Pasadena City Board of Education v. Spangler case*. Your Honor, DOJ cites the *Williams* case for the proposition that nothing in Section 2000h-2 was intended to change the ordinary rules applicable to intervenors. They cite the *Marcaida* case for the proposition that if the government is allowed to intervene, it would be treated as if it were -- just as if it were an original party.

DOJ says that nothing in the case law supports the argument that the United States has fewer rights as a party or some lesser status in a lawsuit merely because it has intervened pursuant to Section 2000h-2. But Your Honor, that is not the State defendants' argument at all. Your Honor, the State defendants' argument is that whether the United States enters a lawsuit as an intervenor or as an original plaintiff, it must having a congressionally authorized cause of action to sue the State of Mississippi to enforce an alleged Fourteenth Amendment violation. That authorization is not found in Section 2000h-2 or anywhere else in the U.S. Code, for that matter.

Your Honor, DOJ cites the *Pasadena* case for the

proposition that once it intervenes, it can maintain an equal protection claim even if the Court were to dismiss the original plaintiffs. But, Your Honor, the *Pasadena* case is a school desegregation case. Again, Congress has expressly authorized the government to sue in school desegregation cases.

Your Honor, the U.S. Supreme Court has never said that Section 2000h-2 itself creates an independent cause of action, and certainly not in a case that is unrelated to desegregation.

Finally, Your Honor, the government argues that the Eleventh Amendment doesn't bar suit against the State when the plaintiff is the federal government. But, Your Honor, the State defendants' argument does not turn on the effect of the Eleventh Amendment vis-a-vis the government. Whether the Eleventh Amendment bar applies or not, the government must still have a cause of action to sue and enforce the Fourteenth Amendment.

The bottom line here, Your Honor, is DOJ has not identified a single case wherein a court has held that Section 2000h-2, the intervention statute, itself creates a cause of action by which DOJ may enforce the Fourteenth Amendment against the State of Mississippi.

Your Honor, Section 2000h-2 merely provides a vehicle by which DOJ can intervene in a pending Fourteenth Amendment equal protection claim subject to certain requirements. Your Honor, the case law makes it clear that this Court cannot recognize a

cause of action for DOJ that Congress has denied it by only authorizing intervention in Section 2000h-2. That is the *Lexmark* case and the *Sandoval* case we have cited in our briefing.

Your Honor, Congress knows how to provide a cause of action to DOJ when it wants to. It has done so in the context of desegregating public facilities and schools, and it has not done so here. DOJ simply does not have a cause of action to enforce the Fourteenth Amendment against the State of Mississippi in connection with a crime reduction statute like House Bill 1020. Therefore, Your Honor, it cannot state an equal protection claim against the State of Mississippi.

Your Honor, if the motion to intervene is to be granted at all, and if the Court finds that DOJ has standing, the State defendants would submit that the motion should nevertheless be denied to the extent DOJ seeks to add the State of Mississippi as a defendant, for the reasons I've stated.

Your Honor, DOJ raises permissive intervention as an afterthought in a footnote in its original brief. Suffice it to say that everything I've said here today in opposition to the motion for intervention as of right applies with equal force to permissive intervention. Your Honor, as we have set out in our brief, DOJ is not entitled to intervene in this case under either theory.

In conclusion, Your Honor, DOJ does not have plenary

authority to sue the State of Mississippi or any other state under the guise of the Fourteenth Amendment anytime it is politically expedient. There is no federal statute vesting the U.S. Department of Justice with roaming authority to sue a state under the Fourteenth Amendment at the whim of the U.S. Attorney General. Under the express terms of the Fourteenth Amendment itself, only Congress can give the U.S. Attorney General that right, and Congress has not done so here.

For all of these reasons, Your Honor, the State defendants respectfully request that the Court would deny the motion to intervene in its entirety as untimely. Alternatively, Your Honor, because the United States lacks standing, the State defendants request that the Court would deny the motion to the extent the United States seeks to add the State of Mississippi as a defendant and to assert claims against Mississippi's Attorney General.

And finally, Your Honor, in the further alternative, because the United States has no cause of action against the State of Mississippi, the State defendants request that the motion be denied to the extent it seeks to add the State of Mississippi as a defendant. Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. NED NELSON: Good morning, Your Honor. Ned Nelson for Chief Justice Randolph. I intend to keep this short.

The Department of Justice correctly acknowledges Your Honor's order of June 1 dismissing the Chief Justice. The proposed complaint and intervention as noted previously does not name him as a party. As a previously dismissed party, we take no position on the government's motion to intervene. The Chief Justice remains neutral on the merits of those issues.

I'm happy to answer any questions you have, Your Honor.

THE COURT: But the import of the intervention would have some impact upon the Chief Justice's ability to act under the statute, correct?

MR. NED NELSON: Yes, sir.

THE COURT: And you said you take no position on that intervention?

MR. NED NELSON: I believe you are asking about the government's ability to obtain an injunction against the State, its impact --

THE COURT: What I'm looking at is the State of Mississippi disagrees entirely with this matter of intervention. You said, on the other hand, that the Chief Justice does not take any position on the intervention. Is that correct?

MR. NED NELSON: Because he is not named as a party and no allegations are made against him, it's not really within the Chief Justice's prerogative to object to something which he is not a party to, Your Honor.

THE COURT: But the intervention aims to limit his right or to appoint or his obligation under the statute to appoint, and even though he is not directly named as a party, the effect of the argument on the other side would impact upon those prerogatives if he still wishes to exercise them. Am I correct?

MR. NED NELSON: Yes, Your Honor. Again, I believe you are referencing the enforceability of an injunction against the State against the Chief Justice and whether or not that would apply to him. Is that --

THE COURT: That is correct.

MR. NED NELSON: Yes, sir, I think we have previously stated numerous times that the Chief Justice has no desire to litigate this matter and would abide by the Court -- by the ruling of the Court.

THE COURT: So if the intervention is allowed, and if after the intervention this intervenor wishes to side step this matter of judicial immunity, as I've mentioned earlier, you still would not have any response or retort to that?

MR. NED NELSON: To side step without naming the Chief Justice as a party?

THE COURT: That is correct.

MR. NED NELSON: Well, Your Honor, if we are not a party, and that's been our position all along, that since June 1st he has been dismissed, I mean, I would have to confirm

that with my client, but our position is we are not going to take a position on something that doesn't name us or accuse us of anything.

THE COURT: As I would appreciate the intervenor's position, the intervenor would want to preclude what the State of Mississippi can do in this instance, and that prohibition on the State's actions would also envelope any official of the state, including your client.

MR. NED NELSON: Yes, sir, and I think that the parties that are necessary and equipped to defend its actions are the gentlemen sitting at this table.

THE COURT: Okay.

MR. NED NELSON: And I think they would be aptly positioned to defend and oppose any injunction. There is good case law out there that says exactly that, that the Attorney General is there for that specific role, and it maintains and preserves the Chief Justice's neutrality and his ability to conduct his official duty as Chief Justice.

THE COURT: All right. Would you check with your client and then see if you have anything else you would like to add on your argument?

MR. NED NELSON: Yes, sir.

(Mr. Nelson confers with Chief Justice Randolph.)

MR. NED NELSON: Your Honor, my client points out a pretty fundamental issue that really had not been clear to me,

that if this Court entered an order enjoining or prohibiting the effectuation of House Bill 1020, regardless of the appointment power or authority, there would be no mechanism or structure to which the appointments could take effect.

So it really would -- as long as the Chief Justice is left out of that, so to speak, then it's -- that's our position is that we just want to be left out of it.

THE COURT: Okay. Thank you very much.

MR. NED NELSON: I'm sorry. If I didn't say this previously, Your Honor, that would apply primarily to funding. The funding structure of these appointees would not take effect. So it really would be a nullity. It would pre-close it. And I have other arguments to make on any of the other pending motions, but this is just limited to the government's motion to intervene.

THE COURT: Thank you so much.

MR. NED NELSON: Thank you, Your Honor.

THE COURT: Reply. After I hear this reply argument, I'm going to take a recess. So go ahead and do your reply.

MR. RUSS: Thank you, Your Honor. Again, Bert Russ for the Department of Justice.

The State defendants have raised a number of arguments made to our position brief, and we have many responses in our reply. Let me address a few of those here.

On the question of timeliness, the United States, as you

know, takes its time when deciding whether to get involved, to spend the resources to get involved in a case, looking at the facts and the law. We don't take action before a statute is finalized. Compromises can be offered. Various proposals were considered in this legislation that might have ameliorated some of the effects and they were not adopted.

Once the law was passed, it is, in my experience doing other litigation with the civil rights division, it's not unusual that it would take a few months for the department to decide if it's going to get involved in a case and what arguments and defendants that it would seek.

So we believe it is timely. As I understand, discovery has not begun. There has not been a 26(f) conference. This is early stage of the litigation. Although there have been a lot of motions that have been considered, we are trying to stay out of those and not -- you know, trying to leave those be. So we believe that it is timely.

In terms of the prejudice, we believe -- certainly the State would not like us in this case, but any intervenor joining the case is not necessarily welcomed from the other side. We believe that we would be prejudiced. The Courts have recognized that we have an interest in defending the constitutional rights of citizens. The Fifth Circuit in the *City of Jackson* case has recognized the United States' interest in protecting the rights of its citizens. And we will be

harmed if we are not able to do that.

In terms of the unusual circumstances, I feel some of that is getting more to the substance. That is not something for the motion to intervene. At a later stage, if the State wants to bring an appropriate action, if they believe we have not stated an Equal Protection Clause claim, that's for another day. The question of intervention as of right, where we are timely, we believe we should be allowed in the case.

On the question of standing, I feel like the State's arguments kind of ignore what 902 does. 902 does not say you have to comply with a different provision of the U.S. Code. It simply says, and let me get the language here, that "Whenever any action has been commenced in any court of the United States seeking relief for the denial of the equal protection of laws under the Fourteenth Amendment on the basis of race, color, religion, sex or national origin, the Attorney General for or in the name of the United States may intervene on such action on timely application if the Attorney General certifies that case is of general public importance. In such action, the United States shall be entitled to the same relief as if it has instituted the action." And that's 42 U.S.C. 2000h-2.

Congress did not set any limitations there. Passing this in the 1960s, Congress wanted to address violations of the Equal Protection Clause on the basis of race. And it didn't say you have to meet some other -- you have to meet some

criteria from another part of the U.S. Code. It is broad authority. Congress chose to allow us to intervene versus bringing cases on our own. That is how Congress decided to set this up, and that is what we are attempting to do here.

Addressing some of the cases that the State has brought up, they bring up the *Kennedy* case in the Southern District of Alabama, and the Sayman case in the Northern District of Illinois to make the argument that 902 itself cannot be a cause of action. Those cases are pro se plaintiffs, not the United States, citing a variety of Civil Rights Act provisions to bring claims, and what those courts hold is that pro se plaintiffs don't have a cause of action under Section 902, which talks explicitly about the United States intervening. So those cases don't tell us anything about the United States' right to intervene.

Again, our cause of action is the Equal Protection Clause and Section 902 is the Congressional authority that let's us come to court in the posture of an intervenor.

Another case brought that the defendants mentioned was the *Lexmark* case, and it claims the United States cannot create a cause of action. *Lexmark* again was a private individual. It was a toner cartridge business looking to sue under a particular statute. The case did not involve the United States. It did not involve Section 902. And the Fifth Circuit, in the *City of Jackson* case, 318 F.2d 1, 1963,

recognized the ability of the United States to have standing to challenge state actions that violate the Constitution.

The State mentioned the Pennsylvania case before the Supreme Court and the Puerto Rico case before the Supreme Court. In those cases, the Supreme Court cautioned that Pennsylvania and the territory of Puerto Rico cannot get involved in litigation where they had no real interest at stake. Again, neither case involved the United States, and neither case involved Section 902. Congress found such an interest in passing Section 902 that the United States had an interest in vindicating the rights of citizens when there are violations of the Equal Protection Clause.

The defendants talk about the *Town of Chester* case, arguing that the U.S. must demonstrate Article III standing to pursue relief beyond the original defendants. That, again, involved private plaintiffs. It did not involve the United States. It doesn't address the ability of the United States to sue states. The matter of *the Fernandez* case, which I mentioned earlier, before the Fifth Circuit, recognized that states give up their sovereign immunity from lawsuits in federal court by the United States, which we have here, and ultimately the United States does have standing to be here because of 902.

One moment, Your Honor. I will look and see if there are other points that I wanted to address from the arguments that

the State has made.

Congress, in passing 902, this is how they decided to set it up, that the United States could address violations of the Equal Protection Clause but only if there was an existing case and only if the United States was intervening. It would make that statute meaningless if we were not allowed to intervene absent pointing to some other statutory provision. In crafting 902, Congress didn't connect it to other statutes, and it wanted to give the Congress -- wanted to give the United States, as we talk about it in our brief, broad authority to address violations of the Equal Protection Clause.

We believe we have a cause of action here. We believe we have standing. Our interests are implicated, and we say more about all of this in our reply brief. I'm happy to answer any questions the Court may have.

THE COURT: Talk to me about prejudice.

MR. RUSS: The prejudice here, the courts, such as City of Jackson, recognized that there is harm to the United States when citizens are denied their rights under the Equal Protection Clause. So it's true the private plaintiffs have brought their own lawsuit, but Congress understood this. By granting us the ability to intervene, that presupposes there's already a private lawsuit out there. And Congress' judgment in crafting 902 was that it was not duplicative for the United States to come in and to be able to make its own arguments.

Otherwise, it wouldn't have crafted this intervention. Intervention presupposes that private plaintiffs have brought their own case.

THE COURT: Well, then here --

MR. CLINE: In this case, yes.

THE COURT: Now, here, what additional argument or what additional relief would you be seeking which is over and beyond what the original plaintiffs were seeking?

MR. RUSS: There are I think two elements that answer. One is adding an additional defendant, the State of Mississippi, to make sure that we have all the defendants that are needed to have relief.

In terms of our specific claims, I believe we focus on three things: The appointment of the temporary circuit judges; the appointment of the judge to the CCID; and the appointment of the prosecutors.

As I understand, in reading the private plaintiffs' amended complaint, they have some additional things in the statute and related statute they would like to enjoin, but there is overlap between those claims and our claims. What we bring is obviously the United States' interest in making sure people's equal protection rights are not violated, and we would also bring an additional defendant.

THE COURT: And of those two factors there, bringing in the additional defendant seems to be the primary purpose of

the intervention. Is that correct?

MR. RUSS: I would not describe it that way. I mean, because, you know, we were thinking about this statute. Obviously we were paying attention to the news, we were watching the litigation and deciding whether it was appropriate to intervene. This is an unusual thing the legislature has done compared to other parts of the state in the way they have changed their criminal justice system, specifically for Hinds County. There is nothing wrong with obviously addressing crime with reforming criminal justice systems, but to do it in a way that denies the voice of the people of Hinds County is the problem here. So that's why we are here.

When we were thinking about the appropriate defendants, we took into account what this Court had already ruled at that point, and we thought who were the appropriate defendants to include. As we mentioned in our brief, we routinely sue states for relief, and that is just kind of our usual practice. Our reply brief, footnote 6, has a long list of cases in the last decade where we have done that.

THE COURT: What I'm addressing here is what advantage to this litigation would the United States bring at this point? And let me just elaborate on that. Where you already have private plaintiffs who have been traveling down this road for quite some time with their arguments and their perspectives on the law concerning all of these matters. So at

this moment in time, with the United States entering this matter, what would the United States bring to this litigation that's not already present?

MR. RUSS: I think what --

THE COURT: Or -- I'm sorry. I have to do that again. Or promising to elicit later on. I mean, what would the presence of the United States add to this litigation?

Now you can go ahead and answer.

MR. RUSS: Thank you, Your Honor. The Attorney General, in looking at the facts going on in Hinds County, found that this was of general public importance. He had to certify that. And it was the judgment of the Attorney General that it was important for the United States to be in this case, that the interest of the United States to vindicate equal protection rights were important.

Obviously, we have very talented private plaintiff counsel. We have experience with equal protection and civil rights claims. We have experts that we could point to to talk about why we believe the statute violates the Equal Protection Clause. We have a lot of experience with *Arlington Heights* litigation.

And again, Congress understood, when it created 902, there would be private plaintiffs. By setting it up for the United States to get involved through intervention, Congress understood there would already be other lawyers who could

litigate it, but if the Attorney General felt the case was of importance, significant importance, then the United States could intervene, and that is what we are doing here.

THE COURT: But still, at this juncture, if you are intervening, allowed to intervene, what would you bring to the arguments that would not be redundant with what the original plaintiffs are already bringing?

MR. RUSS: Certainly we have the ability to sue the State, and I think our case law supports that. There has been the question of can the private plaintiffs get the relief that they need to stop the appointment of the temporary judges if the Chief Justice is no longer in the case. Certainly if we can bring the State in, then that ensures that if this Court agrees that there is a violation, that relief can be granted to stop the appointment of the temporary judges.

THE COURT: So then was the Court correct in its analysis from the start that the primary reason for the intervention was to bring in the State of Mississippi, which is not in this litigation at this point?

MR. RUSS: I would not say it's the primary. It is obviously a reason for us to be here. But again, the Attorney General doesn't do these certifications every day. He made the judgment that what is going on with this bill is a significant problem under the Equal Protection Clause. And that is -- so I would not say that adding the State is a primary purpose. It

is a purpose, but not -- to me, the main purpose is, we believe there is a serious violation of the Equal Protection Clause and we want to have it addressed.

THE COURT: And would you agree with me that by bringing in the State, there would be an indirect address of the Chief Justice's power to make appointments?

MR. RUSS: I think that is correct, Your Honor. If the law is enjoined, then there's nothing for the Chief Justice to -- if the State is enjoined and the law is not in effect on the appointments, then there is nothing for the Chief Justice to do. I would agree with I think your description.

THE COURT: And then what is your position as to the Chief Justice's right to involve himself in this litigation further, even though he is not currently involved, when this indirect end around consideration would impact upon him as an officer of the State of Mississippi and also with his obligations under the statute?

MR. RUSS: I don't think we have thought about what our position would be about the role of the Chief Justice going forward. We have tried not to insert ourselves in that question of declaratory relief, injunctive relief. I don't believe we have a position. If the Court wanted to allow him to remain in as a nominal defendant, we take no position on that.

THE COURT: And what about other state officials?

MR. RUSS: We brought relief against the defendants that we thought were necessary. We understand private plaintiffs have other defendants that they would like to add. We have no opposition to them amending their complaint.

THE COURT: Then this matter of delay, would your intervention cause delay in this litigation?

MR. RUSS: I do not believe so, Your Honor, because we are trying to stay out of the motions that have already come. We would, you know, begin discovery, we would work with the plaintiffs to ensure an efficient presentation of the issues, and I don't believe it would cause further delay.

THE COURT: The State says that your intervention allowance would necessarily involve -- not necessarily, but certainly probably involve additional briefing, additional arguments on the -- against the State, and that all of these matters would have an effect upon this litigation moving forward as expeditiously as it could without your intervention. What is your comment on that?

MR. RUSS: I would not agree with that. I know the private plaintiffs have moved to expedite discovery. We do not oppose that motion. If the Court wants to move efficiently, will do so. I think anytime there is an intervenor, there's the potential the intervenor would write their own brief on a particular motion or join the motion or file their own opposition. I mean, that is the nature of intervention. But I

don't believe it would delay these proceedings or getting to the ultimate conclusion about these laws.

THE COURT: How would the interest of justice be frustrated or prejudiced by your nonintervention if the Court -- how would the interests of justice be frustrated if this Court denies your intervention? How would the -- how would the country be prejudiced if you are not allowed to intervene here?

MR. RUSS: I think as Congress recognized with the statute, we have an interest in ensuring that there are not equal protection violations on the basis of race. And Congress has entrusted the United States, as well as private plaintiffs, through other provisions, 1983, to address these violations. You know, as I said, the Attorney General found this to be a case of general public importance, found this to be a serious problem under the Equal Protection Clause, and so we are taking action to help vindicate that.

If down the road, if private plaintiffs for some reason didn't have standing, weren't allowed in the case, we would still be allowed to pursue the case as the Supreme Court recognized in the *Pasadena School Board* case. So there's a -- you never know what might happen down the road. We would be able to continue the action regardless of what happens with the private plaintiffs.

THE COURT: One more time. What case would you cite

that makes a point of your major premises here?

MR. RUSS: I would say the case I just cited about the Pasadena School Board. I have the citation for you, *Pasadena City Board of Education v. Spangler*, at 427 U.S. 424, 1976, where the United States -- it authorized the United States to continue as a party plaintiff despite the disappearance of the original plaintiffs. I mean, if we had no business being in court, the Supreme Court would not have ruled that way.

THE COURT: Now, what do you say about the other side's attempted distinguishment of that case?

MR. RUSS: Give me a moment to reflect. I don't remember what they had said about it. I think they were talking about causes of action, and I think it's a creative argument that the State is raising, but in our complaint we name equal protection as a cause of action.

I would say *City of Jackson* from the Fifth Circuit back in the '60s, suggested you might not need a statutory basis to come to court. We do have a statutory basis here. We have 902, which is our avenue to court.

I think in terms of the arguments the State is raising, the *LW* case recently kind of looked at this question about the United States coming in, suing the State. That's the *LW ex rel Williams* case. And I think that is -- if you are looking for a more recent case, it basically says we have an unconditional

right to intervene, and once we are in the case, the ordinary rules for an intervenor would apply. So I think if you are looking for a recent case that addresses the ability, the authority for the United States to intervene in a case that already has private plaintiffs, that would be one to look to.

THE COURT: And then, finally, on a matter I raised a few moments ago, if allowed to intervene, would that intervention enlarge this litigation so much so that it would cause a large delay?

MR. RUSS: I do not believe so, Your Honor. Other than the motion to intervene, presently on the pending motion, we would work carefully with the private plaintiffs to avoid duplication to ensure an efficient operation.

I have been involved in other cases with multiple private plaintiffs, and we worked together to make sure to be as efficient as possible with the district judges that we are before.

THE COURT: You might have had counsel on your side who wanted to add something. Did you, when you stood up?

MS. WU: No, Your Honor.

THE COURT: Okay. I thought you were standing a few moments ago because you were seeking to rush to the podium to advise, to advise the speaker here that you had another facet to the argument. That was not a case?

MS. WU: No, Your Honor.

THE COURT: All right. Were you just sort of pre-gauging this recess the Court is about to take? Is that it?

All right. Thank you very much.

MR. RUSS: Thank you, Your Honor.

THE COURT: As I said earlier, when this argument on this matter, when its reply is completed, the Court was going to take its recess. We will be in recess for 15 minutes.

(RECESS TAKEN).

THE COURT: The next matter I want to take up is the matter of the Chief Justice. Mr. Rhodes, you have campaigned to keep the Chief Justice in this lawsuit. I have heard arguments from you as to why he should remain in the lawsuit, notwithstanding the Court's order on judicial immunity, you maintain that because he was sued in more than one capacity, that this Court's order on judicial immunity primarily concerned only one aspect of your complaint and not another aspect about which you were raising claims so that he should still remain in the lawsuit on that other matter.

Now, that judicial immunity opinion I crafted says that he's immune from suit, and if that's the case, why shouldn't that holding be expansive enough to address everything in your complaint that concerns the Chief Justice?

So would you go to the podium and make your argument on that or -- I think you were the one who raised the argument.

Now, if I'm wrong and someone else is prepared to go forward, then I will hear it from that person.

So Mr. Rhodes, am I wrong that that was your argument or was that co-counsel's argument?

MR. RHODES: Your Honor, you are right except I don't think I was that persuasive, so that's why we are going to let co-counsel make this argument at this time.

THE COURT: Okay. And Mr. Shannon, will you be responding to this?

MR. SHANNON: Your Honor, I will be happy to make any response on behalf of the State, if a response is necessary.

THE COURT: And in addition to Chief Justice's -- the Chief Justice's attorney, you will make a response too?

MR. SHANNON: Well, I'm not real clear at this point what the plaintiffs intend to present to the Court right now. I don't know if there is a pending motion --

THE COURT: Then after you all have heard it, you all can tell me who wishes to make the response.

MR. SHANNON: All right.

THE COURT: Thank you.

MR. NED NELSON: Your Honor, any arguments on behalf of the Chief Justice, I will be making.

THE COURT: Thank you.

Now, then, how much time do you think you need on this argument?

MR. CLINE: Your Honor, if I may cover the entirety of the argument, I think it would be 45 minutes.

THE COURT: I don't need that much time. So you don't have to cover, as you said, the entirety of the argument. But the part of the argument which addresses judicial immunity and whether that judicial immunity grant that's recognized by this Court is expansive enough to cover the claims that are made in the complaint in toto, that is what I need addressed.

MR. CLINE: Yes, Your Honor.

So without rehashing too much of what we discussed at the prior hearing on June 14th, the reason that Your Honor's order was only addressing Section 1 of HB 1020 and only injunctive relief under that claim was that counsel for the Chief Justice read plaintiffs' claim -- plaintiffs' complaint to only include that one single claim, so that was the one thing that he attacked in their motion to dismiss, as I discussed previously, and that is what Your Honor picked up on and ruled on in that order on June 1st.

So I pointed out previously at footnote 2, Your Honor says, This order is limited solely to Section 1. On page 6 of Your Honor's order, you quote in full the language from Section 1. And then on page 11, Your Honor says it's addressing plaintiffs' request to enjoin preliminarily and permanently the Chief Justice from making those appointments under Section 1.

So that was the only argument raised previously, and that

was the only argument that Your Honor addressed. So we previously moved for clarification of Your Honor's order because we believed that we had adequately pleaded these other claims in the complaint. And I explained previously how we thought that we had done so adequately.

We have now moved for leave to amend the complaint to provide extra clarity to avoid any possible ambiguity there. We have added the Chief Justice's name where relevant in those two counts, and we've clarified the prayers for relief so that there is no ambiguity and we can proceed on those other claims against the Chief Justice.

THE COURT: But why would not any attempt to amend be an act in futility when the Court has already ruled that he has judicial immunity?

MR. CLINE: That's because the judicial immunity question is a claim-by-claim function-by-function analysis. Your Honor's order said judicial immunity is a fact-intensive inquiry. The Supreme Court in the ***Forester v. White*** case has said that -- if I can find the quote here, "Judicial immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches."

And under the standard of review here, the Chief Justice bore the burden of proof for each function at issue. So we had one function at Section 1, another function at Section 4.

THE COURT: So then tell me what the distinctions are

between 1 and 4 that, in your argument, would affect this Court's determination of judicial immunity.

MR. CLINE: Yes, Your Honor. So under Section 1, counsel for the Chief Justice argued and Your Honor agreed that both Section 1 of HB 1020 and preexisting Mississippi law, Mississippi Code 9-1-105, allow the Chief Justice to make special temporary circuit judge appointments. So as part of the judicial immunity analysis, Your Honor looked to that and found that the appointment of special temporary circuit judges was a normal judicial function, and therefore the Chief Justice enjoys judicial immunity as to a claim for injunctive relief.

You said this at page 21 to 22 or your order. You said, "Both allow the Chief Justice to appoint special temporary circuit judges." Section 4 does not involve special temporary circuit judges. It does not involve any judge who is listed in 9-1-105. It involves a new type of judge, a CCID inferior court judge who is given authority equal to a municipal court judge. And in the state of Mississippi, a municipal court judge has never been appointed by the Chief Justice.

The Chief Justice previously submitted a table of statistics showing the over 1500 prior judicial appointments he had made. Not one of those appointments was a municipal court judge. Mississippi Code 21-23-3 and -9 explain that municipal court judges and the alternates, these temporary judges, municipal court judges pro tem, they are both selected by the

governing authorities of the municipality. So that is the city council, that is the mayor, or that is both. They are never selected by a judge, and they are never selected by the Chief Justice himself.

The Chief Justice and his counsel, notably, in over six pages of briefing across over I think seven filings now has not once tried to argue that judicial immunity would cover the Section 4 claim. They have never tried to carry their burden on that. They have never pointed to any reason why finding Section 1 judicial immunity would apply to a different function for a different type of judicial appointment under Section 4.

So that argument has been waived repeatedly. That argument was not recognized in the original motion to dismiss. There was no acknowledgment of our Section 4 claim. So either that claim was part of our case generally and we adequately pleaded it in our original complaint, in which case we think that the motion for clarification would be appropriate, or if there is any ambiguity there, we have cured that ambiguity by pleading this new first amended complaint where we've, as I mentioned, clarified where the Chief Justice is listed as a defendant and that leave to amend should be granted to resolve that ambiguity.

THE COURT: And a proposed amended complaint, you would be only attacking the judicial immunity holding under Section 4; is that correct?

MR. CLINE: Well, we wouldn't be attacking the judicial immunity holding under Section 4 because there was no judicial immunity holding --

THE COURT: Okay. But you are only addressing Section 4?

MR. CLINE: So we would primarily be addressing Section 4, where because there is no judicial immunity, we can proceed as to injunctive and declaratory relief. We would also be pursuing a Section 1 claim for declaratory relief for which the Chief Justice's counsel has now belatedly abandoned the prior argument that they were making at the June 14th hearing. They have a supplemental filing, ECF 66, at page 1, they now say, "Plaintiffs correctly note that Section 1983 does not expressly bar purely declaratory relief against a state court judge." So they have now abandoned the prior argument that we cannot get declaratory relief due to judicial immunity. So we think we should be able to proceed on that Section 1 claim for declaratory relief as well.

THE COURT: Explain how you see the definition of judicial act as not embracing this matter of the latter judgeship that is still outstanding.

MR. CLINE: Is Your Honor referring to the Section 4?

THE COURT: Section 4, yes. So talk to me about your definition of judicial act. Why would that be a judicial act under the statute?

MR. CLINE: So I would point the Court to *the Davis v. Tarrant County* case that we covered it in the briefings -- this is going back to the motion to dismiss papers. Both sides have cited this Fifth Circuit case. Footnote 3 of that case cites approvingly the case *Lewis v. Blackburn*. In that case, the Fifth Circuit described -- held that a state court judge's, quote, appointment of magistrates is a ministerial act. So not every judicial appointment, as the Fifth Circuit has recognized, will be a judicial act. Some appointments of particularly inferior court judges will be a nonjudicial act.

And a court, a district court following the *Davis v. Tarrant County* case, *Watts v. Bibb County*, which we've also covered in our briefs, that case subsequently agreed with *Davis v. Tarrant County*, and said, yes, an appointment of a magistrate judge is a ministerial act in a state court system that does not enjoy judicial immunity.

So here, again, like I said, we are talking about an inferior court judge, the municipal court judges there -- this is not the superior court judge, like a circuit or a county court. This is a municipal court, so a lower level judge. Those judges are a different type of action, an appointment, and there has been no argument to the contrary.

THE COURT: How do you define ministerial?

MR. CLINE: I'm sorry. What was the question?

THE COURT: How do you define ministerial?

MR. CLINE: Ministerial. Well, ministerial is one type of nonjudicial action. It's ministerial, administrative. I think those are maybe equivalent.

THE COURT: Are you defining it as simply the negative of judicial?

MR. CLINE: I think for these purposes, that is all that is relevant, Your Honor.

THE COURT: So then you are saying that if it is not a judicial act, then it is a ministerial act? Is that what you are saying?

MR. CLINE: I think that is fair to say.

THE COURT: And then are you further saying that if it's not a ministerial act, it is a judicial act?

MR. CLINE: I think for these purposes, we can take that assumption. I think there are other types of acts that are nonjudicial. There are legislative acts. There are executive. There are enforcement type of acts. These are all just ways of distinguishing what is a judicial act from a nonjudicial act.

The core of the judicial acts, Your Honor, are adjudicatory acts. These are acts that counsel for the Chief Justice has raised as kind of a pivot argument now. They are going back to their standing arguments. They are focusing not on judicial acts more broadly but on the narrow subset that is adjudicatory acts. That is the heart of judicial immunity.

You are not allowed to sue the judge presiding over your case in court, even if you believe he has violated your rights.

We are way outside of the bounds there once we start getting into the selection, the appointment of a CCID inferior court judge, which is not based on findings of fact, not based on determinations of law, not based on one party bringing a petition or a claim or cause of action, complaint, and having another party on the other side and adjudicating the dispute between those two parties. So we are well outside the heartland of what a judicial and adjudicatory act is, and I don't believe we are within even a broad construction of the term "judicial act."

But consistent with *Davis v. Tarrant County*, consistent with *Watts v. Bibb County*, the appointment of an inferior court judge, who has never previously been appointed by the Chief Justice before, that that is not a judicial function, that it's not a normal judicial act. It is unprecedented in the state's history, as far as we are aware. And for those reasons, he does not enjoy judicial immunity over that action.

THE COURT: Can you narrow down the elements of what celebrates or what separates these two definitions, ministerial versus judicial? Do you have a test for that?

MR. CLINE: I have not come across a test in the case law.

THE COURT: Well, then, do you have a test that you

could distill from case law?

MR. CLINE: I think the test that I would distill is the appointment of a judge who is inferior to a superior court judge of general jurisdiction is not a judicial act. I think all that matters is the narrow question that we have here. I don't have a grand theory of how a ministerial act can be defined or not defined. All I know is, based on Fifth Circuit law and cases applying Fifth Circuit law, the only cases we have found on either side are in agreement that this type of action that we have here is not a judicial act. There is no precedent for it. It doesn't fit within the test. There has been no argument to the contrary.

I believe that counsel -- the Chief Justice's able counsel, across seven filings, would have mentioned an argument by now if there were an argument to the contrary. We have yet to see that from them.

THE COURT: Thank you very much.

MR. CLINE: Your Honor, may I cover some of the other issues within the motion for leave to amend concerning the Chief Justice or --

THE COURT: Go ahead, then.

MR. CLINE: Okay. So just another point that I would raise just in terms of clarifying the posture we are in here. As I mentioned, Your Honor's order was operating on the assumption that only that Section 1 claim for injunctive relief

was at issue in this case because that's all that had been challenged. Just to refresh Your Honor's recollection, that was because plaintiffs had previously filed a TRO motion only on Section 1, only seeking injunctive relief, and that was the motion to dismiss that was filed in response. They raised arguments attacking just that claim as well as complete dismissal from the case, arguments that Your Honor did not address, did not adopt. There were public policy reasons, reasons of the Chancery Court assuming jurisdiction over this case. Those arguments we have argued against. They don't work in this case. So all that was actually attacked was Section 1 for injunctive relief.

And also, proceeding forward on this motion for leave to amend would be adequate to proceed against the Chief Justice on those claims. As I mentioned, there's a dispute about whether they were in the case before. We think clarifying in the complaint can do that. And I would point to just that there is Fifth Circuit language that is clear that a district court's conclusion must be read in light of the arguments presented to it by the parties. We think that is the situation that we have here and that that confusion was understandable but that we can proceed on the understanding that we have those claims in the case on the amended complaint.

I could respond to the leading cases from opposing counsel, but if Your Honor would like, I can sit down and

address the ones that he raises in response.

THE COURT: One other question I have, though, before you do sit down. The length of time this TRO has been waged against the Chief Justice, does that cause you any heartburn that it's been awhile for that TRO to have been in existence?

MR. CLINE: It does not, Your Honor. My co-counsel, Mr. Lynch, will speak to why a TRO enjoining the effectiveness of Section 1 is appropriate in this case. We just view the matter of who that is directed to as a procedural matter, whether it applies to the Chief Justice who is issuing that appointment or to the judges who have not yet accepted their appointments, currently are just private citizens, whether it prevents them from accepting those offers, or whether if the State were to come in and the State as a whole is enjoined, the bottom line is we believe that an injunction is appropriate in this case, that the statute is unconstitutional, and that it should be prevented from going into effect, because as soon as it does take effect and as soon as the TRO is lifted, plaintiffs' constitutional rights will be violated.

So we would like to preserve the status quo. We have no heartburn over the amount of time the TRO has remained in place. We have a pending preliminary injunction motion against the Chief Justice, but like I said at the start, we are just trying to orient those briefing toward the proper defendant in this case: If Your Honor doesn't believe that that is the

Chief Justice, notwithstanding some of the issues that I discussed previously on June 14th, we think there are ways. We discussed a tentative declaratory decree, or if that wasn't available, that that would mean under the 1983 exception to the exception that declaratory relief was unavailable, therefore injunctive relief becomes available again.

So there are these statutory complexities in this case that we believe could make an injunction against the Chief Justice appropriate. But given that we have a motion for leave to amend on file now, we think the simplest thing to do, going forward, would be to grant that, grant the replacement TRO there that we'll discuss later on today, and that the status of the existing TRO is of no moment in this case.

THE COURT: All right. Thank you. I want to hear now from the co-counsel making the argument about the other aspect concerning the Chief Justice. So go ahead. Make your argument.

MR. CLINE: Concerning the Chief Justice or concerning the John Doe --

THE COURT: The Chief Justice and the John Does, the whole thing. Go ahead.

MR. LYNCH: Thank you, Your Honor. Mark Lynch for the plaintiffs. Thank you, Your Honor, for the privilege of appearing here. We appreciate your courtesy in hearing from us out-of-towners.

Our objective has been from the start and remains getting an injunction that will prevent the appointments from being made, because if they are made, then our theory of harm to equal protection rights kicks in. And I believe the Court has recognized that by having granted a TRO earlier.

Now, because HB 1020 directed the Chief Justice of the Mississippi Supreme Court to appoint four temporary special judges to the Hinds County Circuit Court within 15 days of the passage of the act, we had to move quickly, and we filed that first TRO. Then the state court entered an injunction for a few days, so this Court didn't have to act. But then that state court order was removed, lifted, and the issue became ripe again in this court, and we filed our second motion for a TRO.

Now, the Court granted both of our motions for a TRO, and they remain in effect. But then after the TRO had been granted, the Court issued its order on immunity. And the Court said, as we have discussed, that the Chief Justice enjoys judicial immunity for making appointments under HB 1020 to the Hinds County Circuit Court.

Now, our proposed first amended complaint primarily adds alternative defendants to prevent the judicial appointments in the event that the Court lifts the current TRO against the Chief Justice. The urgency of this situation with respect to the appointments to the Hinds County Court --

THE COURT: Now, Counsel, let me interrupt you here for just a moment. Why shouldn't the Court lift that TRO against the Chief Justice?

MR. LYNCH: Why should it?

THE COURT: Why should it not lift that TRO at this point?

MR. LYNCH: If the Court accepts the procedure we have proposed through our amended complaint, you can do that. We will have no complaints about that. We are seeking an alternative way to prevent the appointments from taking place without having to implicate the Chief Justice. That's the primary -- there are several points, but that is the primary point of our motion to amend the complaint.

THE COURT: Because by not enjoining the Chief Justice, you are saying that the Court instead can enjoin the appointees --

MR. LYNCH: Yes.

THE COURT: -- from taking office?

MR. LYNCH: Yes.

THE COURT: Therefore, you do not have to wage any struggle against the Chief Justice, but instead, you would be focusing upon any appointees that he might name.

MR. LYNCH: That is precisely right with respect to the Hinds County Circuit Court. As Mr. Cline explained, the appointment of the CCID judge, this inferior municipal court

type judge stands on a different footing. But if you decide against us on that, the addition of the -- we have a Doe plaintiff that was a place holder for the CCID appointee, and that would be covered under the same theory that we would be covering ourselves with respect to the Hinds County Circuit Court.

THE COURT: And towards that end, you have caused an ad to be placed in the *Clarion Ledger*?

MR. LYNCH: Yes. You know, under Rule 65(b) dealing with temporary restraining orders, temporary restraining orders can be issued without notice, but we did place that ad in an attempt to provide as much notice as we can that we are seeking to enjoin the appointees. And if you grant the TRO, we will get that order published in the *Clarion Ledger*. And we will also ask you, as a further additional step, please direct the director of the office, the administrative office of the courts, Mr. Greg Snowden, to please ask him to give a copy of the TRO to the appointees before they take the oath of office.

So while 65(b) permits TROs to be issued without notice, we have a number of steps here to make notice before the event happens.

THE COURT: Do you have any direct authority where this course of action has been followed before?

MR. LYNCH: Well, we have cited a case, district court case from Louisiana, obviously in the Fifth Circuit, that

says that it's been a long established practice that parties can name John Doe defendants when the identity of the defendant is not yet known.

Now, it's true we don't know the identity of the Doe defendants, but they are very clearly defined. They are the people that the Chief Justice will appoint. So the Doe function is well established, and in fact, I don't think the State has really made much of an attack on our use of the Does. They have other arguments. Maybe I had better leave it there and see what questions you have next. I don't want to interrupt the Court's train of thought.

THE COURT: No, I'm fine. Go ahead.

MR. LYNCH: So in terms of the authority for this, it is also the case that the Fifth Circuit has held, and we have cited the case in our papers, that a preliminary injunction, Rule 65(a), can be issued before service of process. The State claims that you can't enjoin the Does because they're not part of the case yet. But for purposes of a preliminary injunction, and if it's all right for a preliminary injunction, it is certainly all right for a temporary restraining order, service is not necessary. In other words, a temporary restraining order can run against non-parties. That's well established, I believe.

THE COURT: And again, what is your best case on that?

MR. LYNCH: The best case I will give you in a moment. The case on the use of Does is *Vega versus Gusman*, 2022 Westlaw 912232, and that says, "It has long been an accepted practice to allow claims against an unknown defendant to be amended to identify the defendant when his identity is discovered." So the identities of the Does will be discovered when the Chief Justice announces who they are.

And we are asking for a TRO to be put into effect before the oath of office can be administered so we will have a seemless transfer from the old TRO to this new TRO that we are seeking.

And on the other point I made about Rule 65, the Fifth Circuit held in *Corrigan Dispatch versus Casa Guzman*, 569 F.2d 300, that it is not grounds for reversal of a preliminary injunction that the trial court's interlocutory order was issued prior to the time that the defendant was made a party by substitute service of process. Rule 65(a) does not require service of process. And that was at page 302 of this decision at 569 F.2d from the Fifth Circuit.

THE COURT: Okay. Continue your argument.

MR. LYNCH: All right. Now, Rule 15(a) provides that amendments shall be granted, freely granted, when justice so requires. Now, we think that justice requires this amendment. We, as I pointed out, we had -- the Court had issued a TRO enjoining the Chief Justice, but then the immunity issue popped

up. After the TRO had been issued, the Court reached its ruling that the appointment of the Hinds County judges was a judicial act.

Now, we disagree with that respectfully, Your Honor, but we haven't challenged that. We are not trying to relitigate that. The Court made that ruling, and what we are doing is coming up with an alternative that allows us to go forward to prevent the harm which we seek to avoid, which is the appointment of nonelected judges to the circuit court. So justice requires this.

And I think the logic of the Court's earlier TROs compels that result. You found that the status quo should be maintained so that the harms that we claim would not befall the plaintiffs. And the same logic would apply to the current request for a TRO. The only thing that is different, it's not against the Chief Justice, it is against the Does, who are amenable to enjoy any immunity as long as they are civilians. They don't get any immunity. They are not clothed with immunity. You pointed this out in your June 1st ruling. They are not clothed with immunity until they assume office. So they can be -- if they are enjoined prior to taking the oath, there's no immunity problem.

So justice requires, as Rule 15(a)(2) says, and then you go on to the question is there any reason to deny the motion for amendment. And here we would submit that there is no good

reason to deny the amendment.

And those -- I'm sorry, Judge. I'm jumping around here because --

THE COURT: I know I might have moved you around by asking questions.

MR. LYNCH: And I would much rather answer your questions than talk.

THE COURT: Take your time.

MR. LYNCH: All right. The arguments for denying the amendment are -- well, let me go back. Let me go back to what the Fifth Circuit has said on this, because I wanted to get back to Rule 15. The Fifth Circuit said in *Lyn-Lea Travel*, 283 F.3d at 286, that a motion for leave to amend the complaint may only be denied for a substantial reason. And it gave the -- in the *Thomas* case, *Thomas versus Chevron*, 832 F.3d 386, the Court gave the following examples: Undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment. None of these reasons apply in this case. There is no reason, let alone a substantial reason, to deny the motion for leave to amend.

Now, in their opposition, the defendants -- the State defendants argue that the plaintiffs lack standing to challenge the judicial appointments, and therefore the proposed amendment

is futile. The State defendants assert that they will be prejudiced by further proceedings over an injunction against the judicial appointments, and the plaintiffs have unduly delayed moving to amend.

Now, I will address these three points in order, but first let me make a threshold point. The State defendants don't have standing to make those arguments. These arguments are for the new defendants to make, if they choose to make them, when they are brought in. I assume they will make them because they will be represented by the Attorney General.

As the State defendants concede at page 3 of their opposition to the motion for leave to amend, the Fifth Circuit in *United Planters*, 687 F.2d 117, "Courts considering whether to grant leave to amend should ask whether the amendments will cause, among other things, prejudice to the opposing party." The opposing party.

So in opposing a motion for leave to amend, a defendant may only raise those defenses that are personal to that defendant, rather than to a proposed new defendant who at this point is a nonparty. Here, the State defendants are the Attorney General, the Commissioner of Public Safety, and the chief of the Capitol Police. The proposed amendment does not relate to these three officials at all. They are not named in Counts 1 or 2 of the -- I'm sorry, Counts 2 or 3 of the complaint, which deal respectively with the Section 1

appointments to the Hinds County Court and the Section 4 appointments to the inferior CCID court.

Now, in our reply we have cited two cases that make this point, the first is ***Bell versus Reeves***, 219 Westlaw 4305814, in the Eastern District of Louisiana, and there the Court said, "In the present matter, the defendants raise futility on behalf of the proposed new defendants. It is unclear on what basis the defendants have standing to raise such arguments. Moreover, at this stage arguments concerning futility are premature and may be raised by the proposed new defendants when they make their appearances."

And secondly, in a case called -- this is a tough one to pronounce, ***Ntakirutimana*** -- let me pronounce that for the court reporter, N-T-A-K-I-R-U-T-I-M-A-N-A -- ***versus Community Health Service***. This is 2012 Westlaw 12894294, in the Southern District of Texas. And there the Court said, "The original defendants' attorneys should not have raised personal defenses on behalf of the new defendants in an attempt to obtain a ruling that the plaintiffs should be denied leave to amend to add the new defendants."

So here the proposed first amended complaint makes no material changes to the claims and allegations against the original State defendants, the Attorney General, the Commissioner of Public Safety, and the Chief of the Capitol Police. And they don't contend otherwise. The defendants

haven't contended otherwise. Therefore, they should not be heard to complain about alleged prejudice to the parties we propose to add or to nonparties or to the general public.

The two cases that the State defendants cite in support of their argument that Count 2 of the proposed amended complaint should be dismissed for lack of standing are inapposite because they involve amendments directed at the original defendants who had standing to assert futility, rather than as here, the new defendants, and the current defendants don't have standing to raise their arguments.

Those two cases -- so new defendants must make their own futility argument. They can't be made on behalf of the new defendants by the current defendants when the claims are not made against the current defendants. The two cases are ***Moore versus Bryant***, 853 F.3d 245, Fifth Circuit, and ***Kasprzak versus American General Life***, 942 F.Supp. 303, from the Eastern District of Texas. And those cases stand for the proposition that when the amendments are directed against new defendants, the current defendants aren't the parties to raise the futility argument. The current defendants may raise futility against claims brought against them but not claims brought against the new parties. And the State defendants' opposition has missed this important distinction.

Now, the State also, the State defendants claim that the State of Mississippi will somehow be prejudiced by allowing

plaintiffs' first amended complaint. That claim does not bear on the motion for leave to amend because the State and the public at large are not parties to the proposed first amended complaint.

So the bulk of the State defendants' arguments in opposition to plaintiffs' motion to amend are not properly before Court. They are not the right parties to be advancing those arguments. Those defenses are, at best, premature, and they may be raised only by the parties to whom they belong and only after the plaintiffs are granted leave to amend, which will bring those proposed new defendants into the case.

Now, nonetheless, I will go ahead and address those arguments on the merits, even though they were not properly raised. And here we go back to the text of -- or to the law of Rule 15 -- I'm sorry, the rule -- go back to the law of Rule 15(a)(2), that a motion to dismiss -- an amendment is not futile -- excuse me. I mixed this up. An amendment is not futile if it would fail to survive a Rule 12(b)(6) motion to dismiss. And that's the *Thomas* case which I previously cited. Here the proposed first amended complaint passes that test.

Now, first the defendants, the State defendants, claim that the plaintiffs lack standing. To have standing to challenge a state law, a plaintiff must show an injury in fact to the plaintiff that is concrete, particularized, and actual or imminent; two, the injury was caused by the defendant; and

three, the injury would likely be redressed by the requested judicial relief. A recent Fifth Circuit on that case is *Texas Democratic Party versus Abbott*, 978 F.3d 168, and that case reflects a lot of Supreme Court -- very consistent with the Supreme Court rulings on standing.

Now, plaintiffs claim that judicial appointments violate the Equal Protection Clause plainly satisfies the injury requirement. I don't think there's any serious dispute about that.

As we explained in our preliminary injunction briefing, the challenged laws will imminently deprive plaintiffs of the right to elect their judges, which is a right that is available to every other -- the citizens of every other county in Mississippi, and it will impair their rights as voters and interests as residents by depriving and diluting their voting rights, stigmatizing them as less worthy participants in the political community.

The same is true of HB 1020 Section 4's appointment of the CCID prosecutors because municipal court judges are to be appointed by governing bodies of the jurisdiction, as Mr. Cline pointed out.

Now, as the causation and redressability, the Fifth Circuit has held also in the *Texas Democratic Party* that it is enough to confer standing to sue a government official who has a role in the claimed injury, and he is in a position to

redress the injury at least in part.

Now, clearly, the individuals who would accept the appointments to the bench play a role in causing the alleged injury. And just as clearly, the plaintiff's injury arising from unlawful appointments can be averted, i.e., redressed, by an order enjoining Does 1 through 5 from accepting appointment and taking the oath of office as a Hinds County Circuit Court or as the CCID court judge. And Does 6 and 7 can also -- the injury will also be redressed if Does 6 and 7 are enjoined from accepting appointment as the CCID prosecutors and by preventing them from taking the oath of office.

Now, the State defendants' principal point about standing in their opposition to our motion for preliminary injunction that they incorporate by reference here was that because Chief Justice Randolph is no longer a party to the action, there is no longer anyone with subject power of appointment who is left to enjoin in this case, and that, therefore, plaintiffs could not show how any purported injury is redressable given the Chief Justice's dismissal.

So what we are doing is presenting an alternative way to stop the appointments without the Chief Justice. And granting leave to file the first amended complaint will add defendants who have no immunity before they take the oath of office and who are enjoined from taking the oath of office or otherwise assuming the office will redress plaintiffs' injuries.

Now, another point that the State defendants made prominently in their prior briefing that they incorporate by reference is that plaintiffs have not alleged an injury that is actual and imminent. They cite *Clapper versus Amnesty International,* 133 S.Ct. 1138 for that proposition. But to the contrary, if the current TRO is lifted, the Chief Justice will be certain, as certain as can be, absent some catastrophic event, tornado or the earth is hit by a meteor, it is as certain as it can be that if the TRO is lifted, the Chief Justice will do what the statute tells him to do, which is to make these appointments, because he is required by HB 1020 to do that. In fact, he could do it within minutes of the TRO being lifted. That is as actual and imminent and certain a future injury can be if the TRO is lifted. But if the Court grants the motion to bring the Does in as defendants and issues a TRO against them, then that injury will be averted.

I've already pointed out there's no immunity issue here because the immunity does not kick in until they assume the bench and they start performing the roles of judges. And if they are enjoined from accepting the appointment, from taking the oath of office, they will not be clothed with any judicial immunity at that point.

And the same is true for Does 6 and 7, who are the place holders for the CCID prosecutors, and Section 1983 does not recognize prosecutorial immunity -- excuse me, Section 1983

does not recognize prosecutorial immunity from prospective relief. The Fifth Circuit has held that in *Reed versus Goertz*, 995 F.3d 425. That case said prosecutorial immunity applies only in lawsuits for damages, not for prospective relief. That case, by the way, was reversed on other grounds by the Supreme Court, but on other grounds.

Now, the second argument that the State defendants make against the motion for leave to amend, and again, I believe this is an argument that they really don't have standing to make but we will address it anyway, is that they allege -- they assert that the plaintiffs have unduly delayed in moving to amend the complaint. There's been no undue delay here, Your Honor. The plaintiffs filed their motion to amend three and a half months after they filed the complaint. In *De La Garza Gutierrez versus Pompeo*, the Fifth Circuit held that there was no undue delay in moving to amend when the case was less than 6 months old. So we are clearly in the zone that's acceptable for motions for leave to amend.

The State defendants also cannot complain about the first amendment complaint against certain defendants as a means to obtain the relief that we seek on our constitutional claims if Chief Justice Randolph is unrestrained from making the appointments. Those aren't arguments for the State defendants to make.

Defendant Randolph, for his part, has maintained

throughout this litigation that the plaintiffs should seek relief against other parties, while the remaining defendants have argued that they are not the proper defendants. So what we have done is we have answered both of those arguments. We have now proposed to bring in defendants who are proper and resolved the complaints that have been made previously against the way we set the complaint up.

The limited edits to the allegations regarding the State defendants are really just minor typographical exchanges and are not the kind of change that really makes any -- or presents any grounds for denying a leave to amend.

Then the State plaintiffs go on to argue that the motion for leave to amend should be denied because we have engaged in piecemeal litigation and waited too long to move to amend. This charge is without merit, Your Honor. The plaintiffs' first amended complaint will not require the existing TRO against Defendant Randolph to be in place any longer than necessary to issue the new TRO against the Doe defendants 1 through 4. Indeed, the very point of the proposed first amended complaint is to present nonimmune defendants for injunctive relief on Count 2 if the TRO against Defendant Randolph is lifted.

If anything, allowing the first amended complaint and granting the motion for a TRO could facilitate the Court's resolution of Defendant Randolph's insistence that the TRO

against him be lifted while still maintaining the status quo by allowing the proposed new defendants to be enjoined instead.

And furthermore, even if the Court did extend the TRO or grant a new one, that is not a cognizable injury that would support a claim of undue prejudice because a party cannot be harmed by being prevented from violating the Constitution. The Fifth Circuit held that in *Deerfield Medical Center*, 661 F.2d 328.

Furthermore, the premises of the prejudice argument are also faulty. The timing and the sequence of the issues that the plaintiffs have presented to the Court have been dictated by the different dates on which different provisions, HB 1020, take effect. As I mentioned earlier, there were 15 days to act with respect to the Hinds County appointments. The CCID appointment won't happen until January 1st, and there are other dates. There are dates scattered all over this statute providing different times for different aspects of the statute to come into effect, and that is what has dictated the pace at which we have presented issues for the Court's resolution. The inherently piecemeal nature of this litigation was thus directed by the -- was the choice of the legislature, not of the plaintiffs.

Excuse me for a moment. Furthermore, the charge that the plaintiffs have been dilatory ignores that this case was filed only four and a half months ago, and no initial order, no

attorney conference, no discovery, and no scheduling order has been entered to date. These are early days of a piece of litigation, Your Honor. And this is in sharp contrast to the *Union Planters* case that the State defendants cite, 687 F.2d 117. That's been cited as an example of a case that denied leave to amend based on undue delay. In that case, a sharp contrast to this case, the defendant sought to amend his answer more than a year after the case was filed, after discovery was completed, and after the Court had entered summary judgment on the issue of liability against the defendant, a very, very different posture than this case.

The State defendants also ignore the facts of the actual history of this litigation. And just to remind the Court, we had this very urgent necessitous situation presented by the 15-day deadline, and we had to attempt to enjoin those appointments on an urgent schedule. We sought a TRO on April 28th, just one week after filing the complaint. That motion was mooted, however, on May 4 by the action of the Chancery Court, and then the Chancery Court vacated its injunction on May 11th, and that very day we renewed our motion for a TRO.

On May 12, the Court entered the immunity order -- I'm sorry, on May 12, the Court entered a TRO restricting the Chief Justice from making the appointments until the Court had conducted a hearing on the second motion for a TRO and until it

rendered its ruling on the Chief Justice's immunity defense, which he had raised in a motion to dismiss filed on May 4.

By May 24, the plaintiffs -- and on May 24, the plaintiffs move for a preliminary injunction.

Now, up until this point, up until this point, the most obvious party to target for an injunction to prevent the judicial appointment in Count 2 was the Chief Justice because he was the person designated by the legislature to make the appointments. We have made no allegation. We don't intend in any way to disparage his good faith, his fidelity to the law. We are not making any allegations about discrimination on his part. He was just, unfortunately for him, the person put in this position by the legislature.

Now, we had a good faith belief that the Chief Justice was not immune from injunctive relief, because based on our reading of the cases, the Fifth Circuit's four-factor test indicated the appointment of circuit court judges to nearly full four-year terms was not a judicial act, and the immunity in 42 U.S.C. Section 1983 for judicial officers applies only to actions brought against the judicial officer for an act or omission in such officer's judicial capacity. We had a good faith basis for that, Your Honor, and you disagreed with that. And now we take our lumps in that regard, and we are not contesting that ruling. We are moving forward to deal with the obstacle that that ruling placed in the path to vindicating the

rights of our clients.

So then that was on June 1. There were several hearings and more papers filed and colloquies between the Court and the parties in the period after June 1. But then on August 3rd, it was August 3rd when we moved to add the new parties, just two months after the immunity ruling came down, which upset the apple cart from our perspective. And there is no way that two months can be characterized as undue delay.

And particularly, particularly that is not undue delay where the State defendants have not filed a motion to dismiss, discovery has not yet begun, no trial has been scheduled. The proposed amendment does not raise new substantive claims. It doesn't change the underlying theory of our case. And most of the activity to date has whirled around the efforts of the Chief Justice to extricate himself from parts of the case for which he doesn't enjoy immunity.

Defendants have cited no case and plaintiffs are aware of none where a Court in similar circumstances has found two months to be undue delay in pursuing the course that plaintiffs pursue here to remedy an early adverse ruling.

Now, we point out that Rule 15(a)(2) is intended to remedy problems like the one we faced following the immunity ruling. The State defendants cite the leading case of ***Foman versus Davis***. That's the case we all read in law school. It was decided in 1962, the leading case on Rule 15. And that case

says, "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

The immunity ruling was not a ruling on the merits. It was a ruling on a procedural issue, i.e., whether the Chief Justice enjoys immunity. And the fact that it was not a ruling on the merits and that we've come up with an alternative to the non-merits ruling is very consistent with the goal of Rule 15, which was to allow parties to breach the merits of the case. As Wright & Miller put it, Rule 15's purpose is, among other things, to provide maximum opportunity for each claim to be decided on the merits rather than on procedural technicalities. No longer is a party irrevocably bound to the legal or factual theory of the party's first pleading. That is Section 1471 of Wright & Miller.

Here the State defendants, as well as Defendant Randolph, contend that the plaintiffs are prevented by a non-merits defense of immunity from gaining an injunction against the amendments. In response to that obstacle, which is unrelated to the merits, the substantive merits of the complaint, the substantive merits of their claim, the plaintiff are seeking to pivot the other defendants who until they take the oath of office and assume office do not enjoy immunity.

If I said it, I will say it again because I think it is

important. The underlying legal theory is the same. The appointments violate the plaintiffs' right to equal protection because the statute deprives only the residents of Hinds County of the opportunity to elect their judges, and the overwhelming percentage of those residents are black.

But I might point out here, Judge, the white residents of Hinds County are injured by this appointment. They have a right to elect judges just as much as everybody else, and it's being taken away from them. This is a case of denial of a fundamental constitutional right, even without the race issue or the race factor being taken into consideration.

So for all of these reasons, we think that the amendment should be granted.

And then finally, in their opposition, and Mr. Shannon averted to this earlier today, they claim that the crime reduction goal of HB 1020 is so important that it trumps -- it outweighs the assertion of our constitutional rights. That is a wrong and a dangerous theory. We briefed that earlier in the preliminary injunction hearings. And we have explained that the interest in public safety cannot trump an individual's constitutional rights. Public safety must be pursued consistently with the constitutional rights of the citizens.

Thank you, Your Honor. I realize this is kind of a long presentation, but it is a complicated situation, and I hope I've been able to win my way through it with some degree of

clarity for you.

THE COURT: Thank you.

MR. SHANNON: Your Honor, before I respond, may we take a brief five-minute recess?

THE COURT: Sure.

MR. SHANNON: Thank you, Your Honor.

THE COURT: Let's make it ten minutes. Well, let's see. 12:37. Why don't we take our lunch break then. Did I hear some rumbling out there? Okay. It's 12:37. Let's make it 2:00, so everyone can find somewhere to eat.

(RECESS TAKEN AT 12:37 P.M. UNTIL 2:00 P.M.)

THE COURT: All right. Let's pick up where we left off.

MR. SHANNON: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. SHANNON: May it please the Court.

Rex Shannon with the Attorney General's office. Your Honor, I want to first respond to something counsel opposite said in his argument. I believe I heard him to say that I had said something from this podium along the lines that public safety considerations should somehow trump the constitutional rights of the plaintiffs. I don't think I have ever made that statement. Certainly there's a disagreement as to whether the plaintiffs' constitutional rights have been violated. That's what we are here about in this lawsuit.

Your Honor, as to the judicial immunity issue, the State defendants have never taken a position on judicial immunity per se. We don't take a position on that today. We accept on the face of the Court's order of dismissal the fact that Chief Justice Randolph was previously dismissed from this action in its entirety. All the claims against him were dismissed in accordance with the order that Your Honor entered previously.

On that basis, we have previously argued and reurge today that the pending TRO that's still in place, that there's no longer any basis for that TRO to remain in place, given the Chief Justice's dismissal, because there's no longer any defendant currently in this lawsuit who is susceptible to a federal injunction enjoining the judicial appointments that are required under House Bill 1020.

Beyond that, we take no position on the judicial immunity issue, Your Honor. We did respond to the motion for clarification. We would stand on that response.

Moving on, Your Honor, counsel opposite, prior to our lunch break, essentially argued a motion for leave to amend their complaint and a motion for a second TRO as to certain prospective appointees, and I would like to respond briefly, very briefly to both of those motions.

THE COURT: Go ahead.

MR. SHANNON: As to the motion to amend the complaint, the State defendants oppose that motion for two

reasons: Number one, we submit the motion is futile because the plaintiffs lack standing. Number two, Your Honor, we submit that the motion will unfairly prejudice the State defendants by unduly delaying the resolution of the improper TRO that continues to bar judicial appointments under House Bill 1020.

As to standing, Your Honor, it is well settled that a plaintiff's motion to amend their complaint should be denied where the amendment is futile. We have cited the *Crenshaw-Logal* case and the *Briggs* case in our brief, both from the Fifth Circuit. It is also well settled that an amendment is futile where the proposed amended complaint would be subject to dismissal for lack of standing. We cited *Moore v. Bryant* from the Fifth Circuit, as well as the Casper's Act case out of the Eastern District of Texas for that proposition.

Your Honor, the State defendants have argued standing at length in previously filed responses opposing the plaintiffs' first renewed TRO motion and their motion for preliminary injunction, both of which were directed to the plaintiffs' judicial appointment claim. Those arguments appear in the record at Docket Number 34 at pages 5 through 7 and at Docket Number 50 at pages 11 through 18. I believe we have also argued standing orally before this Court prior to today. I won't rehash or belabor those arguments here today. I will just say that all of the standing arguments made in opposition

to the judicial appointment claim apply with equal force to each of the claims sought to be asserted in the plaintiffs' proposed amended complaint.

Your Honor, the plaintiffs' proposed joinder of additional defendants doesn't cure their lack of standing as to the State defendants. If the Court agrees and accepts the State defendants' argument on standing, then the proposed amended complaint would be subject to dismissal, at least as to my clients, for lack of standing. In other words, Your Honor, the lack of standing renders the proposed amended complaint futile at least in regards to my clients, the three current State defendants.

Contrary to what the plaintiffs have said in their reply brief, my clients absolutely have standing themselves to assert futility on the basis of the plaintiffs' lack of standing with respect to the proposed amended complaint as it relates to the State defendants because they are attempting to amend to once again sue my clients.

Your Honor, all three of my clients plead lack of standing as the fourth defense in their answer to the original complaint. That defense applies to the proposed amended complaint as well. Your Honor, the State defendants have every right to reurge that defense now in opposition to the plaintiffs' proposed amended complaint, which fails to cure the plaintiffs' lack of standing. Based on the lack of standing

here alone, Your Honor, the motion for leave to amend should be denied as futile.

Moving on, Your Honor, briefly, the motion to amend should further be denied because the proposed amended complaint we submit, Your Honor, would unfairly prejudice the State defendants. It is well established that a Court may consider such factors as prejudice and undue delay in denying a motion to amend the complaint. We cited the ***Woods*** case and the ***Blue Cross*** case to that effect in our brief.

Your Honor, in our response, we noted that the plaintiffs are asking this Court to let them refile their lawsuit to add seven additional defendants. That was in fact a misstatement. They are actually seeking to add nine additional defendants, that is, the director of the Mississippi Administrative Office of Courts, Greg Snowden, the executive director of the Department of Finance and Administration, Liz Welch, are both in their official capacities, as well as seven John and Jane Doe defendants. Your Honor, nothing prevented the plaintiffs from naming these folks as defendants at the time suit was originally filed.

The plaintiffs continued piecemeal prosecution of this case is unfairly prolonging any decision on a key piece of state legislation designed to reduce crime in Hinds County. Your Honor, this whole motion is obviously an attempt to get around this Court's dismissal of Chief Justice Randolph. At

the very latest, Your Honor, the plaintiffs could have sought to amend over two months ago when Chief Justice Randolph was dismissed on judicial immunity grounds.

Your Honor, as we stand here today, the TRO blocking these critical judicial appointments in Hinds County has been in effect for 116 days and counting. That is 88 days longer than the 28-day period authorized by Rule 65(b)(2).

Your Honor, the State defendants submit that this continued enjoinder of state crime reduction legislation is unfairly prejudicial to the interest of the people of the state of Mississippi and living and working in a safer capital city. Your Honor, allowing these plaintiffs to amend their complaint at this late date to add nine new defendants will almost certainly contribute to further delay in resolving the de facto injunction that continues to bar critical judicial appointments. Your Honor, we submit that this is a piecemeal and dilatory attempt at amendment, and the Court should reject it as unfairly prejudicial to the State defendants.

Your Honor, in their reply brief, the plaintiffs say that my clients should have nothing relevant to say about the proposed amended complaint. Your Honor, they say my clients have no personal stake in the Hinds County judicial appointments, and therefore they can't possibly be prejudiced by the proposed amendment, but that is simply not the case. The whole point of House Bill 1020 is to help make the city of

Jackson and Hinds County a safer place for all of us who actually live and work here on a daily basis.

One of my clients is the Attorney General of the State of Mississippi who was sued in her official capacity, and my other two clients are the director -- or the commissioner of the Department of Public Safety, which includes the Mississippi Highway Patrol and other entities, as well as the Capitol Police Chief, also both sued in their respective official capacities. Certainly, Your Honor, all three of these state officials have an interest in public safety and law and order. They have as much right to assert the State's sovereign interest in enforcing its duly enacted legislation, duly enacted public safety laws. They have as much right to assert those as these plaintiffs have in attempting to invalidate those laws. Respectfully, Your Honor, for all of these reasons, the State defendants respectfully request that the Court would deny the motion to amend the complaint.

Moving on, Your Honor, to the second motion that the plaintiffs have argued just prior to lunch, the motion for a second TRO, this being a TRO to enjoin prospective appointees, Your Honor, the State defendants submit that this newly filed TRO motion should be denied because it is premature. And I will explain briefly, Your Honor.

The plaintiffs are asking the Court to enter a TRO to prohibit prospective judicial appointees and a prospective

prosecutor from accepting appointment or taking the oath of office or otherwise assuming office in Hinds County. Your Honor, as things stand today, we don't know who these prospective appointees will be. Regardless, Your Honor, those individuals are not now nor have they ever been parties to this litigation. They will only become parties, even as fictitious John or Jane Doe defendants, if and when this Court grants the plaintiffs' motion to amend their complaint to make them parties and the plaintiffs actually file their complaint, their amended complaint.

Your Honor, unless and until that occurs and the plaintiffs file their amended complaint, there is no operative complaint by which this Court can assert personal jurisdiction over these prospective judicial appointees. Your Honor, that means the Court presently has no authority, respectfully, Your Honor, to temporarily restrain any prospective appointees pursuant to Rule 65 or otherwise. Your Honor, for that reason, any injunctive relief presently directed against such prospective appointees is premature and should be denied.

Your Honor, the plaintiffs say these individuals don't have to be parties to be enjoined. That may be a semantics issue, but the State defendants will submit that is not the case. Your Honor, certainly Rule 65 permits the Court to enjoin a defendant before they are served and even without notice. But they still have to be named as a defendant in an

operative complaint that is filed and pending on the Court's docket.

For one thing, Your Honor, a Court has no jurisdiction to issue a restraining order against somebody who is not even a named defendant in a pending lawsuit. Your Honor, additionally, it is well settled that injunctive relief cannot be awarded in the ether. I mean, there has to be an operative complaint stating some cause of action against a person who has sought to be enjoined when that particular type of equitable relief is pursued.

Your Honor, if this Court allows the plaintiffs to file an amended complaint naming these prospective appointees as defendants, and if the plaintiffs in fact file such amended complaint, that may be a different story, but Your Honor, I would submit that, nevertheless, the plaintiffs have not made the requisite showing to support a TRO. And to make that showing, Your Honor would have to make findings of fact on each of the different four factors of the motion for temporary restraining order. We've briefed all that previously in regard to two prior TRO motions, as well as a motion for preliminary injunction, and I would incorporate those arguments today without belaboring the point.

But unless and until an amended complaint is authorized and filed, this Court can't issue a TRO to somebody who is not even a named party in a pending lawsuit. That goes for any

appointees as well as the AOC director, Mr. Snowden. I heard counsel opposite earlier ask the Court about the prospect of enjoining him or instructing him to do something. He's not a party to this lawsuit yet, so I don't believe the Court has jurisdiction to order him at this point to do anything.

Your Honor, respectfully, the plaintiffs have cited a single case in support of their argument that a TRO can be issued against a prospective defendant who has not yet been named in an operative pending complaint. In their brief, that case is *Corrigan Dispatch Company v. Casa Guzman, SA*, 569 F.2d 300. That's a 1978 Fifth Circuit case. But Your Honor, that case, as I read it, doesn't say what the plaintiffs imply that it says. That case merely says that Rule 65 does not require service of process before a named defendant can be enjoined.

Your Honor, as I read that case, the entity sought to be enjoined had already been named as a defendant in an operative interpleader action. They just haven't been served yet. That's not the case here.

Your Honor, in the cases before Your Honor today, none of the John or Jane Doe defendants has even been named in an operative complaint yet. Until they are, Your Honor, respectfully, this Court has no authority to order them to do anything, and the current TRO motion should be denied.

Your Honor, as I say, the motion should further be denied for all of the reasons set forth in the State defendants'

previously filed responses to the plaintiffs' renewed TRO motion and motion for preliminary injunction. Your Honor, those responses appear at Docket Number 34 and Docket Number 50 on the Court's docket.

Your Honor, the State defendants would hereby adopt and incorporate by reference the arguments and authorities set forth in those responses. Once again, a critical public safety feature of House Bill 1020 continues to be barred by this Court's TRO entered on May 12th of this year. That TRO has now been in effect for 116 days. Again, that is 88 days longer than the 28-day timeframe permitted by Rule 65(b)(2).

Your Honor, for all of these reasons, the State defendants respectfully request that the Court would deny the plaintiffs' motion for a TRO as to the John and Jane Doe defendants and dissolve the current TRO directed to Chief Justice Randolph. Thank you, Your Honor.

THE COURT: Your jurisdictional argument, is that subject matter jurisdiction or in personam or both.

MR. SHANNON: That is in personam jurisdiction, Your Honor.

THE COURT: Thank you.

MR. NED NELSON: Your Honor, Ned Nelson for the Chief Justice. Before I begin, I want to clarify something real quickly that we discussed before lunch. Plaintiff's counsel made some arguments about the motion to amend, and in doing so

conceded the reality of Your Honor's dismissal order of June 1, and recognized that the Chief Justice had been dismissed as a party. If I have heard him correctly, then we would ask that the Court take up again the Chief Justice's motion for 54(b) certification and I will sit down.

I'm not asking for arguments, but that was my impression of what counsel said before lunch, is that the motion to amend and the amended complaint proposed would alleviate Chief Justice Randolph's dismissal and would ameliorate them somehow. Am I accurate in saying that?

THE COURT: Not quite. Make your argument.

MR. NED NELSON: Would you like me to continue to make my argument?

THE COURT: Make your argument.

MR. NED NELSON: Yes, sir.

Number one, the motion to dismiss that was filed by the Chief Justice in May was not a partial motion to dismiss or a motion to dismiss some claims but not all claims. It was a motion to dismiss the complaint against him. It addressed all claims versus the Chief Justice. In doing so, it requested that the complaint, not claims, be dismissed.

Your Honor's order granting that motion reads as follows: "It is therefore ordered and adjudged that Defendant Michael K. Randolph, in his official capacity as the Chief Justice of the Mississippi Supreme Court, be dismissed from this litigation

because of judicial immunity. The motion to dismiss, Docket Number 19, filed by the Chief Justice hereby is granted."

Your Honor, the motion for clarification, the plaintiffs' position statement on the continuity of the TRO, which is Docket 47, and all of the subsequent motion practice is an attempt to avoid that one-sentence order and to confuse the issues and to bring things up that were available to the plaintiffs prior to the Court entering its motion to dismiss.

The judicial immunity definition, and all of this was addressed in the motion to dismiss back in May and ruled upon by Your Honor in June, is not qualified -- the application of judicial immunity is not qualified based on the remedy sought with the cause of action alleged by the plaintiff. As simply as possible, it is defined as when a judge acts within their jurisdiction, then they are shielded by judicial immunity. That's not qualified based on the relief sought.

Section 1983 states, real quickly, "In an action against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or a declaratory relief was unavailable."

That requires that a judge take an act or omission in order to, number one, to qualify him as a defendant. And we can all -- I think it's all been conceded multiple times that the Chief Justice has done nothing wrong. He has violated no

one's constitutional rights. Even by the plaintiffs' position thus far, he has made no appointments. No judges have taken office pursuant to 1020.

So that does not fit within the definition of 1983. There is no -- and that is limited to the availability of an injunction where a declaratory order was violated. It doesn't mean that that judge has to be a party to that declaratory order. It is just that one is violated or was unavailable. But where one is sought, a declaration is sought, it is inherently available. That does not change the definition of judicial immunity.

So when plaintiffs' counsel states that those arguments about declaratory judgment have been waived by counsel for the Chief Justice, that is simply untrue. That was all raised. The standing arguments on adversity, adverseness of the parties, case or controversy, and standing were all addressed and briefed in the motion to dismiss in May. And in granting the Chief Justice's motion to dismiss, that was before the Court.

The declaratory judgment claim that plaintiffs now say was not disposed of by Your Honor's ruling was first raised after the motion to dismiss. And again, their complaint was their complaint when it was filed in April, they knew the claims that were made then, and that issue could have been addressed in response to the motion to dismiss, but it was not. It was not

until after the Court granted the motion to dismiss before that ever became an issue.

Your Honor, another thing I would like to point out, plaintiffs' counsel stated that somehow Section 4 of House Bill 1020 is distinguishable because it compels the Chief Justice to appoint inferior court judges, and that is somehow unique and different than any other appointment regiment that is available to the Chief Justice, and that is not true. The Chief Justice appoints judges to inferior courts as defined by the Mississippi Constitution on a regular basis, specifically the county court judges. There's a statutory court as opposed to a constitutional court.

THE COURT: So give me a listing of the various court judges whereby the Chief Justice has made appointments. We know he has done it in special circuit court matters, county court matters.

MR. NED NELSON: Yes, sir.

THE COURT: Chancery court matters.

MR. NED NELSON: Yes, sir.

THE COURT: There's a chancery court matter he made an appointment.

MR. NED NELSON: Yes, sir.

THE COURT: And there are other positions beyond the judges, but what times did the Chief Justice make appointments to, let's see, justice court judges, city judges, municipal

judges, any of those?

MR. NED NELSON: I would have to defer to my client on that, on specific appointments to justice court appointments. Can I confer with my client?

THE COURT: Why don't you confer.

(Mr. Nelson confers with Chief Justice Randolph.)

CHIEF JUSTICE RANDOLPH: Judge, the first question you asked about justice court, typically when a justice court judge has a recusal that comes up, one of the other four or five in the county sit in that position, so there's no request made. The municipal court, they generally have a judge pro tem. I don't recall making either. I don't know of any prohibition. I just never had a request.

THE COURT: All right. Thank you.

CHIEF JUSTICE RANDOLPH: You're welcome.

MR. NED NELSON: Your Honor, as of today, it's been 96 days since the Court's order granting the Chief Justice's dismissal. Since then, it's been 96 days that he's been a dismissed party. He has filed since then one motion, and that was a motion for 54(b) certification.

This Court's ruling on that motion, the 54(b) certification, in all fairness, our position is that that should be addressed prior to considering the plaintiffs' motion for leave. As filed, the proposed amended complaint names the Chief Justice as a party and does not recognize the Court's

order dismissing him and makes materially the same allegations against the Chief Justice as the original complaint and delineates what causes of action reference him, what prayers for relief are directed towards him, but the factual allegations and the actual claims are materially the same.

As a result of the post-order motion practice, the Chief Justice has been held in limbo defending repeated attempts to bring him back into litigation which he is no longer a party to. And for three months now, the Chief Justice has endured this practice seemingly without relief. The continued involvement of the Chief Justice in this practice has been at great expense and distraction from his duties on the court, duties which he would much rather be attending to.

Respectfully, the Chief Justice respectfully requests that the Court determine what role he should be playing moving forward, and that would inherently define what objections specifically we have to any proposed amended complaint, if that is necessary. We are hesitant to respond to plaintiffs' motion for leave on the merits if it is unnecessary. If we are indeed dismissed, then that's no longer an issue for my client.

As you know, the Chief Justice's position from the outset has been that he takes no positions on the merits of the case and does not intend to participate in the case beyond what is necessary or compelled. If the Court affirms its June 1st order, which we believe was the right decision when it was

made, his neutrality in this matter can be preserved. The Chief Justice has no interest in arguing for or against a legislative act, something he had nothing to do with. As stated all along, he owes duties to the Court and the Court alone.

Specifically addressing the declaratory judgment arguments raised by the plaintiffs, Your Honor, that was raised, as I mentioned, for the first time on June 6th after the Chief Justice was dismissed. That position statement, Docket 47, was filed in response to an inquiry from chambers to the remaining counsel. It was not addressed to counsel for the Chief Justice.

It said -- and I've read it, I don't have it before me, but that e-mail invited that filing to be made, and we were not party to that. The Court's own docket, as of yesterday, recognizes that the Court -- that the Chief Justice was, quote, terminated, closed quote, next to his name on the docket sheet. Clearly, he was a dismissed party. By all indications, it's left us in this amorphous position, and we are here today specifically simply because the amended complaint names him in the suit, and there have been repeated attempts to draw him back into litigation. And there's nothing unambiguous about that to us that needs to be clarified, Your Honor.

The law is clear that judicial immunity bars the plaintiffs' claims against the Chief Justice. That was the

Court's decision on June 1st. That is unequivocal when it comes to injunctive relief, and any claim for declaratory relief was not raised prior to the Court entering its order, and those arguments were waived when the Court made its decision granting the Chief Justice's dismissal.

The Chief Justice raised the issue -- as mentioned, the issues of standing, case or controversy, and adverseness, Docket 20, at page 2 through 6. Those independent grounds for dismissal were properly raised before the Court when it made its decision. Plaintiffs state that their motion to clarify is distinct somehow from a motion to alter or amend under Rule 59 or 60. But if this Court is to take up that motion or grant the relief that it requests or somehow continue to maintain the Chief Justice as a defendant, it would require the Court to go back and undo the decision it had already reached in its June 1st order. So that, by our definition, is inherently a motion to reconsider. It requires the Court to change its mind.

Plaintiffs' counsel goes to great lengths to take out of context statements made in pleadings about what arguments have been waived or what arguments were included. It is true that the text definition or the text of Section 1983 itself does not expressly prohibit declaratory judgments against a judge. And this is set out in our pleadings that there is no case law that suggests that a state court judge or a justice of the Supreme

Court in this instance to be a proper party in a facial constitutionality challenge where there has been no past conduct to be declared unconstitutional. That is because 28 U.S.C. 2201 itself mandates the plaintiffs must establish the existence of a live case or controversy.

The cases cited by the plaintiffs were instances by and large where judges' actual conduct operating under state law were being challenged as unconstitutional, thus establishing adversity between the parties, in turn Article III, case or controversy. Again, the motion for clarification and all of the pleadings since then, the plaintiffs' position statement, the motion for clarification, its notice of additional authorities was filed in the end of June, all of those were brought as a thinly veiled attempt to raise legal arguments that were before the Court and could have been raised prior in response to the motion to dismiss.

Even assuming that the plaintiffs' claims for declaratory judgment were not disposed of by the Court's June 1st order, the plaintiffs have completely failed to satisfy case or controversy requirements. Multiple courts have held in any federal challenge of the state law's constitutionality, a judge is simply not a proper party.

I would like to just point out a couple of the holdings, and these are all cited in our papers, Your Honor, that in order to receive declaratory or injunctive relief, a plaintiff

must establish a violation of a constitutional right, the risk of continued irreparable harm if the relief is not granted, and the absence of an adequate remedy at law. It is a very common quote. They cannot meet the first element, a violation, a past violation under color of state law made by my client. Again, no case or controversy exists between a judge who adjudicates claims under a statute, that is, takes a judicial act under a statute and a litigant who attacks the constitutionality of that statute. A judge acting in an adjudicative capacity is not a party, proper party to a lawsuit challenging that law, because the judge, unlike the legislature or the Attorney General's office, has no personal interest in defending the law as constitutional.

This Court has already held that the Chief Justice received a legislative grant of jurisdiction to appoint the judges contemplated by House Bill 1020. And that's from Your Honor's order at page 21. Separately, this Court found that if the Chief Justice is to act within his jurisdiction and appoint those judges, they are inherently judicial in nature, subjecting him to judicial immunity. It is a well-worn path, Your Honor, and we have been down -- we were there three months ago. That is the only requisite to shield the Chief Justice with immunity: Did he act within his jurisdiction? And it doesn't matter whether it's a circuit court appointment or a county court appointment. It's is it within his jurisdiction

of the law to do. And that requirement of a justiciable controversy cannot be satisfied where a judge acts in their adjudicatory capacity. That is from *Bauer v. Texas*, and that's quoted at Docket 66, at page 3.

Excuse me, Your Honor. May I get some water?

The Fifth Circuit has repeatedly held that where a plaintiff cannot establish an ongoing injury caused by the defendant state judge and the threat of any future injury is not imminent, there exists no case or controversy for the Court to resolve rendering a declaratory judgment inappropriate.

So in conclusion, Your Honor, this Court has already determined that judicial immunity shields the Chief Justice from any claims for injunctive relief.

Second, any declaratory judgment claims that were not somehow disposed of by your Court's comprehensive order, those are nonetheless meritless because they failed case or controversy standing requirements.

Your Honor, we are not here to relitigate those issues that were before Your Honor and decided by the Court. We are here to respectfully request that the Court decide how it intends to proceed with my client. We believe the Court was correct when it made its decision on June 1st, and the unreasonable motion practice that has taken place since then is certainly no fault of the Court. However, the Court alone can do something about it and bring finality to the Chief Justice's

involvement in this matter. And that is all we request, Your Honor, is just some closure and resolution as it relates to my client so he can go back to his business down the road.

I will open it to any questions Your Honor may have.

THE COURT: Yes. This looming appointment of CCID personnel, in what arena do you place that?

MR. NED NELSON: The appointment of CCID personnel?

THE COURT: No, judge.

MR. NED NELSON: Judge.

THE COURT: Is that similar to a special circuit court judge, county court judge, justice court judge or what?

MR. NED NELSON: Yes, sir, Your Honor. The Mississippi Court of Appeals has thus far -- and that, again, is Mississippi law as interpreted. The appointment of judges by the Chief Justice of the Supreme Court without caveat or exception qualifies as a judicial act for purposes of judicial immunity.

THE COURT: And how do you distinguish the functionality of this CCID judge from other judges?

MR. NED NELSON: From other judges? I've not specifically studied the CCID court's jurisdictional limits or anything like that. As opposed to circuit court appointments or -- I couldn't answer that without studying the specific functions of it, Your Honor.

THE COURT: Do you have someone on your side over

there who could?

MR. NED NELSON: Not my side specifically, but I believe the attorney in this room equipped to argue that would be someone at this table.

For purposes of judicial immunity, Your Honor --

THE COURT: No, I just want the functions.

MR. NED NELSON: Okay.

THE COURT: And who will then argue that over there?

MR. SHANNON: Your Honor, if you are speaking to counsel for the state defense, I'm not prepared to make any argument on the functionality of the CCID court today. It doesn't pertain to any motion that our clients have responded to, I don't believe, today. If the Court has specific questions, we would be happy to try to answer those.

THE COURT: I just want to know how you view the functions and how those functions differ from the functions of other courts.

MR. SHANNON: Again, Your Honor, I'm not prepared to comment on that today. We would certainly be happy to address that later on if the Court would like us to.

THE COURT: Okay. I will get back to you in just a moment.

MR. SHANNON: All right.

THE COURT: What about anybody else over here who can tell me the functions of the CCID court?

MR. MARK NELSON: Mark Nelson. We see no difference in the appointment of CCID judges or the municipal judges or county judges or circuit judges or chancery judges or any other judge that the Chief Justice appoints. They all fall under the same penumbra of the judicial act. As far as the functionality of the Chief Justice when he is about making his order and signing it at his desk, it is all the same.

Now, the functionality of the Court would be different. A chancellor, of course, has a different type of jurisdiction in Mississippi, unlike the other 49 states. It is a unique court of equity. That is where all the divorces take place, and that's where the land issues are. So yes, they do function differently.

Criminal defendants are, as you know, exclusively jury trials in circuit court. But the functionality of the two judges makes no difference to the Justice when he is appointing a person, either a man or woman, to that position. It is a judicial act.

THE COURT: I understand the argument that it is a judicial act. But I'm asking about the functionality of the different courts. And do you know of any distinctions?

MR. MARK NELSON: No, sir, I see no distinction in it at all.

THE COURT: Well, there is a distinction between chancery court, county court, circuit court. Is there a

distinction with the CCID court?

MR. MARK NELSON: Personally, I see the CCID court as a circuit court, as a court of criminal process. That's the purpose for which the court is set up.

THE COURT: But does it say that in the act?

MR. MARK NELSON: No, sir, the act doesn't necessarily say that.

THE COURT: So then what's in the act concerning CCID?

MR. MARK NELSON: It's ambiguous, Your Honor. It just doesn't say.

MR. NED NELSON: Well, any definition to that court's jurisdiction is spelled out in how it is described. But from my client's perspective for that purpose of judicial immunity, Your Honor, I will echo what my co-counsel said, that appointments are appointments are appointments. Appointment of judges is appointment of judges.

THE COURT: Well, do you have anything else over here relative to the powers of the CCID court?

MR. SHANNON: Your Honor, if I may, Rex Shannon, on behalf of the State defendants. As far as the State defendants go, we would stand on the statutory text. It is outlined in the bill. I believe the section addressing the CCID court is Section 4. To my knowledge, no Court has yet construed any substance of this bill or this statute at this point for us to

have any guidance in terms of interpretive guidance. We would just stand on the statutory text, Your Honor.

THE COURT: Well, tell me what the statutory text says, then.

MR. SHANNON: Would you like me to read it into the record, Your Honor?

THE COURT: Yes, please. Would you do so?

MR. SHANNON: Yes, Your Honor.

THE COURT: Why don't you go to the podium so you can get the benefit of the microphone.

MR. SHANNON: Yes, Your Honor. Your Honor, I'm reading from House Bill 1020, the final version as sent to the Governor, which is now the statutory language. Specifically Section 4, subsection 1A reads as follows, and I shall quote verbatim.

"From and after January 1, 2024, there shall be created one inferior court as authorized by Article VI, Section 172 of the Mississippi Constitution of 1890, to be located within the boundaries established in Section 29-5-203 for the Capitol Complex Improvement District, hereinafter referred to as CCID. The CCID inferior court shall have jurisdiction to hear and determine all preliminary matters and criminal matters authorized by law for municipal courts that accrue and occur in whole and in part within the boundaries of the Capitol Complex Improvement District, and shall have the same jurisdiction as

municipal courts to hear and determine all cases charging violations of the motor vehicle and traffic laws of this state and violations of the City of Jackson's traffic ordinance or ordinances related to the disturbance of the public peace that accrue or occur in whole or in part within the boundaries of the Capitol Complex Improvement District."

Subsection B reads as follows, quoting verbatim: "Any person convicted in the CCID inferior court may be placed in the custody of the Mississippi Department of Corrections Central Mississippi facility."

Reading from Subsection 2, which is the successive next subsection, quoting verbatim: "The Chief Justice of the Mississippi Supreme Court shall appoint a CCID inferior court judge authorized by this section. The judge shall possess all qualifications required by law for municipal court judges. Such judge shall be a qualified elector of this state and shall have such other qualifications as provided by law for municipal judges."

Continuing, Subsection 3, and I quote: "The Administrative Office of Courts shall provide compensation for the CCID inferior court judge and the support staff of the judge. Such compensation shall not be in an amount less than the compensation paid to municipal court judges and their support staff in the city of Jackson."

Subsection 4: "All fines, penalties, fees and costs

imposed and collected by the CCID inferior court shall be deposited with the City of Jackson municipal treasurer or equivalent officer."

Subsection 5: "This section shall stand repealed on July 1, 2027."

Your Honor, from there, Section 5 of the statute goes on to discuss the Attorney General's designation of prosecuting attorneys. But I believe in reference to your Court's question about the jurisdiction of the CCID court, the text I just read would explain that, Your Honor.

THE COURT: It would appear, then, that that court would be a misdemeanor court. Do you agree with that?

MR. SHANNON: Your Honor, I'm not prepared to make that characterization standing here today. I know we have made arguments in the Mississippi Supreme Court regarding the nature of the CCID court, that it has equivalent jurisdiction to a municipal court, but I would stand on those arguments. I'm not prepared today to comment further on it.

THE COURT: Go a little further on if it is there, the maximum sentence in a criminal case that the CCID court could impose.

MR. SHANNON: Your Honor, I don't have that knowledge.

THE COURT: You don't think it's in the statute?

MR. SHANNON: It may be in the statute, but off the

top of my head, what I just read, I would stand on that. I'm just not prepared to comment. I'm not knowledgeable of the text well enough to give Your Honor that information standing here today.

THE COURT: Okay. Thank you.

MR. SHANNON: Yes, Your Honor. Thank you.

MR. NED NELSON: Your Honor, do you have any additional questions?

THE COURT: I do. The Chief Justice has informed that if there's a vacancy on the municipal court, that ordinarily he would not be making an appointment there. So then on this matter of judicial immunity, you are saying that he's covered because he is a judge empowered to act as a judge when he might make an appointment. So even if he were going to make an appointment to a municipal court, are you saying, then, that he would still enjoy judicial immunity?

MR. NED NELSON: Yes, sir.

THE COURT: Even though ordinarily he would not be making an appointment to a municipal court?

MR. NED NELSON: Yes, sir. His inclusion in a statute that authorizes him to make that appointment has nothing to do with that statute's legality any more than it does make him an adequate or proper party to challenge that statute.

THE COURT: One of the factors that I pointed out in

my opinion on the road to his judicial immunity was that in the past he had made appointments of circuit court judges and other judges, county judges, et cetera, and that that was a traditional function that the Chief Justices had been allowed over the years. But in this matter concerning a misdemeanor court appointment, are you agreeing that there will be no tradition of a Chief Justice ever appointing a municipal court officer?

MR. NED NELSON: In that limited circumstance, there are none to my knowledge, Your Honor. The definition, or the exceptions to judicial immunity, and this is -- again, I'm going to rely on our pleadings -- are where a judge acts without jurisdiction to do so. Even if it is a judicial act, if it is taken without jurisdiction -- again, I think we have said this before on the record, Your Honor, that we are not saying that the legislature cannot authorize the Chief Justice to assault someone or commit a crime of some sort. That would be -- he has no jurisdiction to do that. But he does have jurisdiction to make judicial appointments. But he would be acting within his jurisdiction in doing so.

THE COURT: All right. Thank you.

MR. NED NELSON: Yes, sir.

THE COURT: Let me turn to the other side. Thank you so much. Counsel, I have a question for you now.

MR. LYNCH: Thank you, Your Honor.

THE COURT: If the Mississippi Legislature empowered the Chief Justice to make appointments in vacancy situations to municipal courts, would that affect your argument on the denial of judicial immunity?

MR. LYNCH: I didn't get the first part of the question, Judge.

THE COURT: If the legislature allowed the Chief Justice to make appointments in cases of vacancy to municipal courts, even though the Chief Justice traditionally has not been making such appointments in such cases of vacancies, would then your argument on judicial immunity be different?

MR. LYNCH: Here's how I think we would respond to that, Your Honor. The legislature has a lot of power, and if they say that the Chief Justice can appoint somebody to a court that he has never appointed anybody to, the question is not whether the legislature can do that. I think the legislature could. But is it a judicial act? And because there is no tradition, no history of the Chief Justice appointing judges to this misdemeanor court, inferior court, because there is no tradition in history, then it should not be characterized as a judicial act.

Furthermore, supporting that proposition is that the normal way to select a municipal court judge in municipalities of a certain size threshold, which Jackson clearly meets, it's the responsibility of the governing board of the jurisdiction.

So I would be very hesitant to say that the judge enjoys immunity for invading a historic prerogative of the local municipality.

THE COURT: But how would the Chief Justice be invading that traditionally recognized approach if the Mississippi Legislature empowered him to do so?

MR. LYNCH: It would be a conflict of law situation that the Court would have to sort out. And I recognize it would be two acts of the legislature whereas authorizing the Chief Justice to appoint circuit court judges invades the constitutional provision of the Mississippi Constitution, which are such judges should be elected. But I think because of the absence of the tradition, any background, it would -- in interpreting what might seem to be a conflict -- conflicting pieces of legislation, that in analyzing whether it is a judicial act, the lack of any experience, which we have now on the record from the Chief Justice, would be very persuasive and should be given a lot of weight.

THE COURT: But why would the Mississippi Legislature not be empowered to do that?

MR. LYNCH: I don't think you should assume that the legislature was invalidating the tradition and statutory authority of jurisdictions -- the governing bodies of municipalities who appoint their municipal court judges. I would be very hesitant to think that this statute intended to

override and invalidate that statute.

THE COURT: But on the other hand, wouldn't the Mississippi Legislature be presumed to know all of its statutes?

MR. LYNCH: I think that is probably a recognized proposition, Your Honor, but --

THE COURT: And if it knows all of its statutes and then renders a statute of first blush providing --

MR. LYNCH: But also --

THE COURT: Excuse me. Let me finish this -- providing the Chief Justice the power to appoint vacancies in municipal courts, wouldn't then that be a valid exercise of the Mississippi Legislature and also a recognition that in so doing the Mississippi Legislature that would have had implicit knowledge of its own statutes, be acting within its power and thus could enlarge the power for the Chief Justice to make that appointment?

MR. LYNCH: To do so, I would think it would be necessary to have an explicit repeal of the statute that sets up the authority of municipalities -- the governing boards of municipalities to select their circuit court judges. I don't think you can -- I think it is very -- there are a lot of canons of statutory construction, and one of them is that the legislature doesn't repeal its own statutes sub silentio.

THE COURT: Well, what about an implicit repeal?

MR. LYNCH: I think those are highly disfavored.

THE COURT: It might be disfavored, but you're not saying that it is powerless to do so?

MR. LYNCH: Oh, they certainly have the power to amend or repeal existing statutes, but when they don't say that's what they are doing, a Court should be reluctant to infer or imply that that's what they did.

THE COURT: Let me go to another angle on this same question. The CCID court is a new court. Thus, it has no traditional path to tell us what is ordinarily done relative to that court. So then that court -- this court would be a court of first impression, correct?

MR. LYNCH: It is a first of its kind, but it shares so many characteristics of a traditional municipal court that it's not that much of a new wine, so to speak. It has so many of the characteristics of a traditional municipal court that I don't think counsel on the other side of the podium here get that much mileage out of that fact.

THE COURT: Now, this CCID court, this court allegedly would have powers of a municipal court, and thus by extrapolation, one would expect, then, that court to be limited relative to punishment for one year or less.

MR. LYNCH: Yes.

THE COURT: So then can't the Mississippi Legislature determine the terms and the sentences that should be imposed in

the various courts?

And furthermore, I want to add one other thing. With regard to the CCID court, since all of its powers have not been explicitly determined at this point, then can this court actually function constitutionally if one does not know the powers, duties, restraints, limitations of said court?

MR. LYNCH: I think there are a lot of problems with the vagueness of this creation of the CCID.

Your Honor, I've got to follow the lead of Mr. Shannon and say that we need to study these issues in a little more depth before I can confidently speak on all of them. I've gone a little further than he did, but I would like to make the same reservation he did.

THE COURT: Okay. But what you have concluded, I believe, is that this CCID court is essentially a misdemeanor court which is similar to municipal courts that are already in existence in Mississippi. Is that correct?

MR. LYNCH: Yes, it has some additional powers and some pretty potent powers, one of them being the authority to bind -- to sentence people to serve periods of incarceration in the state penitentiary, which is a huge departure.

THE COURT: Now, are you saying that they could do that?

MR. LYNCH: It's in the statute, yes.

THE COURT: That they could sentence persons to the

state penitentiary?

MR. LYNCH: Yes, Your Honor, that's one of the big objections.

THE COURT: You know, I think I saw that, but at the time that I saw some of these matters, I wondered, then, what was the penalties that were involved, which is why I asked a few minutes ago about what penalties.

Now, I heard some of the offenses that were mentioned, but is there anything in the Mississippi statutes that says that a person who goes to the penitentiary is being sentenced more akin to a felon as opposed to a misdemeanant?

MR. LYNCH: I believe the -- I believe that incarceration in the state penitentiary is an attribute of a felony conviction and that people don't get sent to the state penitentiary for misdemeanor violations.

THE COURT: Well, people have gone to the state penitentiary for misdemeanors.

MR. LYNCH: Your Honor, again, we need to study this more. This isn't a great excuse, but let me just speak about what we have been dealing with. Again, it's the cadence that was set by the legislature of the different effective dates, and we have focused like a laser beam on the Hinds County appointments because they were to be done within 15 days of passage.

The CCID doesn't come into effect until January 1, 2024.

And for better or for worse, we have proceeded to -- we have proceeded to address these issues on the clock that the legislature set for their effective dates.

THE COURT: Okay. But I asked about the civil rights days, the '60s, and I have a clear memory of civil righters who were arrested who were sentenced to the penitentiary.

MR. LYNCH: Yes. And I -- there's a lot of history there, Judge, and I think that was recognized as a terrible violation and a terrible departure from Mississippi practice, but again, I, like Mr. Shannon, need more time to look into this.

THE COURT: Thank you very much.

MR. LYNCH: Can I respond to Mr. Shannon's comments?

THE COURT: Yes, he is waiting on you to respond. Mr. Shannon, just hold on.

MR. LYNCH: It's actually a fairly short presentation for such a long lunch break.

THE COURT: Go ahead.

MR. LYNCH: As oftentimes is true in life, timing is everything. And to a large extent, Mr. Shannon's argument distorts the timing of what we are proposing. So let me be very clear about that.

Step one, we asked the Court to grant the motion for leave to amend the complaint. So then we will have an operative complaint.

Step two, we asked the Court to enter a TRO against the Doe defendants -- well, 1 through 4, the Hinds County Circuit Court appointees, issue a TRO.

And point three, of great importance, to issue that TRO before you lift the TRO that is currently restraining the Chief Justice so that there's not a sliver of opportunity to have these appointments made. And this will extricate the Chief Justice at least from the issues on injunctive relief with respect to the Hinds County Circuit Court.

So, you know, the way Mr. Shannon presented what we are proposing, he kind of mixed up the order of battle or the sequence that we are proposing, and it did sound kind of crazy. We were asking you to issue a TRO before there was a complaint. No. We are asking you to grant the motion for leave to amend, that will take care of the complaint, and then move on to the TRO, and then the Court would be in a position at that point to lift the TRO against the Chief Justice. That's what we are proposing. And that timing and sequencing is very important so that there's not a sliver of opportunity for the Chief Justice to do what the statute commands him to do.

When we get him out of the way, we get the Doe plaintiffs in, and then we can get the Chief Justice out of the way on that Hinds County issue.

Now, we have other issues with the Chief Justice. Mr. Cline can respond to that. But that's what I really wanted

to make in response to Mr. Shannon.

Secondly, he says that his clients, the State defendants who are in the case now, are named in the complaint with respect to the appointments. I'm sorry. That is just wrong. If you look at the preface to Count 2, which starts at paragraph 141 of the proposed amended complaint, and the preface to Count 3, which begins at paragraph 147 of the amended complaint, the Attorney General, the director of public safety, and the chief of the Capitol Police are not named in those counts. They don't concern him. That's why I say they don't have standing to raise these arguments. They are not implicated by these counts. And this is one of the changes. This is one of the changes we made in the amended complaint. We spelled out, we itemized the names of the people that were being sued on each count, and those three State defendants are not brought in on Counts 2 and 3.

I think that that responds to the principal points that I wanted to make -- that makes the dual points I wanted to make in response to Mr. Shannon. If the Court has any questions, I'm happy to answer them. Thank you very much.

THE COURT: Thank you. But Mr. Shannon, what about his argument just then that they are not named?

MR. SHANNON: Well, Your Honor, the Attorney General and the two -- the DPS commissioner and the Capitol Police chief are named as defendants in the proposed first amended

complaint. It's our argument and always has been that the plaintiffs don't have standing to sue any of these defendants because they have not demonstrated any legally cognizable injury. We have argued that at length in previous briefing and from this podium in previous hearings.

That same defense would apply with respect to the proposed first amended complaint. I'm just simply making the point that I believe we have standing to assert standing as a defense to the proposed first amended complaint, just like we did with respect to the original complaint. None of the claims against my client has changed, as I appreciate it, in the first amended complaint. It's the same claims, albeit the plaintiffs are attempting to add I believe nine additional defendants, if I have it right, seven John and Jane Does, the AOC director and the BFA director. Thank you, Your Honor.

THE COURT: Thank you.

MR. CLINE: Thank you, Your Honor. I would like to start with one of the questions Your Honor was asking about the pending state court challenge. There's been no motion for the Court to abstain in this case, so those issues haven't been briefed. I would direct Your Honor back to our original --

MR. MARK NELSON: Your Honor, we cannot hear counsel. Please speak into the mic.

MR. CLINE: I would direct Your Honor back to our opposition to the motion to dismiss where we cited the Fifth

Circuit case, *Murphy v. Uncle Ben's*. That's 168 F.3d 734. The Court there said, "Courts have a virtually flagging obligation to exercise the jurisdiction given them."

There's been no request for the Court not to exercise that jurisdiction, so we believe continuing with the case is proper.

THE COURT: Did you say flagging or unflagging?

MR. CLINE: Unflagging. Virtually unflagging.

THE COURT: Yeah, it should be unflagging. Go ahead.

MR. CLINE: I heard two important concessions in what Mr. Nelson was saying here. First, that the Chief Justice has never before appointed a judge who exercises the powers of a municipal court judge. There are mentions of a county court judge, of a justice court judge. Neither of those have the same authority and function as a municipal court judge.

Second --

THE COURT: You say they don't have the authority of what now?

MR. CLINE: A municipal court judge.

THE COURT: You are saying county judges don't have that same authority?

MR. CLINE: They are not equivalent to. They have greater authority. They have, I believe -- actually, I don't have --

THE COURT: Doesn't county court have jurisdiction over misdemeanor cases too?

MR. CLINE: I believe they may have greater jurisdiction, Your Honor, but that goes back to our point that the Fifth Circuit cases, we have *Davis v. Tarrant*, we have a case citing that, *Watts v. Bibb County*, and *Davis v. Tarrant* was citing *Lewis v. Blackburn*. All of those cases are saying that for an inferior appointment, such as a magistrate judge, that that is not a judicial act.

So it is of no importance that a county court, which the Chief Justice has previously appointed, will have greater authority, because here we are talking about the CCID inferior court, which has lesser authority. And that lesser authority is usually appointed by the governing authorities of the municipality, so it's not a judicial function.

I would just point Your Honor back to page 17 of Your Honor's order. You talk about the guidepost factors. You say there are four factors for determining whether a judge's actions were judicial in nature and thus protected by the shield of judicial immunity: One, was a normal judicial function involved? Two, did the relevant act occur in or adjacent to a courtroom? Three, did the controversy involve a pending case in some matter? And four, did the act arise directly out of a visit to the judge in his official capacity?

If Your Honor will recall, when looking at the Section 1 analysis, the only factor that was found, as we read Your Honor's order, the only factor that was found to weigh in favor

of judicial immunity was that first factor, was it a normal judicial function. Your Honor said yes. Looking to 9-1-105, that statute had historically allowed appointments of temporary special circuit judges. Even that factor is lacking here. So we are zero for four.

My friend on the other side is simply mistaken to say whenever a judge acts within their jurisdiction, they get immunity. That has it backwards. Courts apply the test. Your Honor, properly applied here, looking to those four factors, that is the test. The question of whether they are acting within their jurisdiction is an exception to that.

So even if the judge satisfies this test for judicial immunity, they may nevertheless be subject to liability if they are acting beyond their jurisdiction. So if they are doing something that is normally something a judge does, you know, adjudicating a dispute, but it turns out they had no business adjudicating that dispute in the first place, say it was a judge from Alabama here in Mississippi, way outside their jurisdiction, it's a normal judicial act. That would get judicial immunity normally. But if they are beyond their jurisdiction, then they can be subject to liability. That's not what we have here. So they are misconstruing the test. They are putting it backward there.

We went over some of this before at the June 14th hearing, but they have made this point again, that we could have

addressed Section 4 in our opposition to the motion to dismiss. I've said this before, but we framed our response as posed by the motion itself. We had no obligation to preempt any affirmative defenses that were not raised in the motion to dismiss itself. And one would have thought that if we had waived any argument there, that would have been pointed out in the reply brief. It was nowhere mentioned in the reply.

But because we are in a new posture here than we were on June 14th, I think it bears repeating. If it is true that, as counsel for the Chief Justice is saying, that for the first time we raised the Section 4 claim and a declaratory relief claim only after Your Honor's order, then I think that is all the more reason for Your Honor to grant the motion for leave to amend. That concedes those issues were not before the Court when Your Honor was considering and issuing your order, and we now have new issues that are not precluded for the reasons I've said. By the Court's prior order, there is no reason to not allow us to go forward on that motion to amend.

There is also -- reading -- my friend on the other side was reading the one sentence or so conclusion of Your Honor's order, that the Chief Justice was dismissed from the litigation. It bears repeating. But note 2 of Your Honor's order says, This order, however, only addresses HB 1020, and more specifically, that allows specific provision Section 1. So whenever Your Honor said that Chief Justice was dismissed

from this litigation, it's from the litigation concerning Section 1. And as I've said before, page 11 points out that that was with respect to the pending TRO request for injunctive relief.

Now, possibly the final point, there may be one after, there is this pivot from arguing that now that they can see that the declaratory relief claim is allowed by Section 1983, I heard nothing to the contrary. This is what they have conceded before. This is, of course, why injunctive relief may be allowed under 1983 if declaratory relief has not been available or was violated. That presupposes that declaratory relief could have been granted in the first place.

I take it they maintain their concession that that is allowed under Section 1983. They now pivot to say that even though the statute allows it, the Constitution doesn't, because there is no standing to raise that type of claim. They haven't cited to cases for that today, but they have in their briefs, so I can just talk through some of or all of them.

Their leading case is ***Bauer v. Texas***. They've mentioned this one before. We talked about it last time. That case involved a trust beneficiary who had a guardian ad litem appointed on a petition to a probate judge, and she was dissatisfied with that process. She didn't want the guardian ad litem to have been appointed, so she subsequently brought a federal lawsuit against the probate judge under the guise of

challenging the guardian ad litem statute.

The Fifth Circuit there said that is unacceptable for two reasons: First, there is no likelihood that a future guardian ad litem petition would be filed against this woman and adjudicated by this judge, so there is no threatened harm, no imminent likelihood of future harm. That was the first issue. Of course, there is nothing like that here. For reasons my co-counsel said, we face a very imminent risk that there will be injuries to the constitutional rights here if the TRO is lifted, if the Chief Justice is allowed to comply with HB 1020.

The Court went on, then, and said that, quote, Judges enjoy absolute immunity from liability for judicial or adjudicatory acts, end quote. Because determinations made under Section 875 are within a judge's adjudicatory capacity, there is no adversity between Bauer and Olsen, the probate judge, as to whether Section 875 is facially unconstitutional.

So the posture you had there was a facial challenge to a state law with the defendant being the judge who adjudicates that petition. So that is a collateral attack on that other adjudication in that judge's adjudicatory capacity where he would make determinations under that state law. That is not the situation we have here. We just have a regular appointment with no determinations, no claims, no petition, no adjudication at all.

I could walk through the rest of their cases if Your Honor

would like. All of their cases are like this. *In Re: Justices of Supreme Court of Puerto Rico* is one example. They say, There is no standing where judges, quote, sit as adjudicators, finding facts and determining law.

Whole Woman's Health, for example, no standing to sue State Court judges who decide SB8, quote, private civil actions. The most recent case that they cited, *Machetta v. Moren*, "Gary Machetta is a party to an ongoing child custody proceeding with his ex-wife in Texas state court. Unsatisfied with the outcome of those proceedings, Machetta filed a complaint in federal district court against the Texas state judges presiding over his case."

So we have nothing like that here. There is no reason that the Constitution, that Article III standing, should be an obstacle to us pursuing what they have conceded is allowed under Section 1983 itself. And that's why in addition to the Section 4 claim, we should be able to proceed under Section 1 for declaratory relief.

We have two cases that we could offer as an example of how this happens. They have made the claim that never in the nation's history has a Court declared a statute or actions taken under a statute unconstitutional with a judge as a defendant. That just isn't true. *Rivera Puig*, 785 F. Supp. 278, this was a decision within the First Circuit that was decided a decade after *In re Justices of the Supreme Court of*

Puerto Rico. They allowed an attack on the constitutionality of a state law against the judge, despite a judicial immunity defense, and found, "declaratory relief was proper."

In that case, this was a reporter who was trying to report on a criminal matter with a high profile defendant, and the state criminal code allowed the judge to exclude members of the public from the courtroom if there was a very sensitive matter that was coming up, and the reporter wanted to access the courtroom and wasn't able to and so brought suit.

So this is a prospective suit because nothing had happened yet. This was about an upcoming matter. They were seeking immediate relief. Because there was a judge, because there was this worry about judicial immunity, they sought a declaratory judgment. They weren't seeking -- or they may have sought an injunction, but the Court granted only the milder form of relief, this declaratory relief. And that is one of these cases that saying, of course, it is assumed that a state court judge is going to abide by a declaration of the constitutionality of the law, so they didn't find it necessary to go all the way and to issue an injunction. This is one of those types of cases. Because of this, judicial immunity defense had been interposed.

Just to clarify where we are, the judicial immunity defense has not been properly argued for Section 4. I'm just talking about Section 1 here for declaratory relief.

The second case I will mention -- so that was pretty squarely on point outside of the Fifth Circuit. Within the Fifth Circuit, we have slightly more indirect but also instructive, *Caliste v. Cantrell*. That is the case we discussed previously that that appears in our briefing. That case involved Louisiana state judges who would get a percent of the fees from commercial surety bonds sent back to their court district for them to use on their support staff and for other things, to keep the courts running.

The plaintiffs in those cases were concerned that the judges were increasing the bonds that they were requiring in order to direct more fees to the court, and all the judges in that court sat on a panel that chose what to do with the fees that were collected. So the Fifth Circuit upheld the declaration that those actions pursuant to that law of setting these bond rates and then having those fees directed back to the court, that that fact was unconstitutional where a state court judge was a defendant.

And as I said previously at the June 14th hearing, there is a footnote in there saying that they don't need to decide the issue of judicial immunity because it didn't matter, because they were only seeking a declaration there.

So at the end of that case, the Fifth Circuit is kind of agnostic about whether what they were saying was a declaration of unconstitutionality of a state law or what the individual

judge was doing, but they did then say, quote, It may well turn out that the only way to eliminate the unconstitutional temptation is to sever the direct link between the money the criminal court generates and the general expense fund that supports its operations.

On remand, after further proceedings, that's exactly what the Louisiana Legislature did. To avoid the unconstitutionality of the statute, in their view, they amended that so that the fees that were generated from the commercial surety bonds were not directed to the judicial district in which they arose.

So that is just an example. That is instructive within the Fifth Circuit how the Court can issue a declaration of unconstitutionality that applies more broadly to the statute itself with the judge as a defendant.

THE COURT: But that addressed the statute, right? I mean, the Louisiana Legislature amended the statute --

MR. CLINE: Yes, sir.

THE COURT: -- relative to the practice of collecting the fees and what could be done with the fees. But now the judge who was sued did not suffer any prejudice under that decision; is that correct?

MR. CLINE: So the judge, as the defendant, received this declaration that his actions under or related to that statute, that those actions were unconstitutional. So the

Court withheld deciding whether it was him specifically, that he could avoid the unconstitutionality, or whether the law was creating this impermissible temptation.

So, for example, the Court didn't decide if this judge were to step down from the panel that was allocating the funds, if that would suddenly make it constitutional. But maybe the chief judge of the court could direct where the funds would go, or maybe that would still be constitutionally problematic under the state statute as well. So they withheld judgment on that issue of how to cure it. They just said that this has set up an unconstitutional situation, and the Louisiana Legislature responded by fixing the statute.

THE COURT: Well, but the Louisiana Legislature didn't say that we are going to deny judicial immunity.

MR. CLINE: The Louisiana Legislature did not say so. This is the case, recall, where in a footnote, I believe it was footnote 7, the Fifth Circuit said judicial immunity has no relevance to this case, because whether he is judicially immune, whether he is not, this is an action for declaratory relief, and declaratory relief is allowed against immune judges.

THE COURT: That's what I was saying. It did not make a pronouncement that had an effect on judicial immunity, the decision by the appellate court.

MR. CLINE: They did not make a decision that had an

effect on judicial immunity, but they assumed he wasn't immune. Remember, this was a situation where a judge is setting a bond amount for a criminal defendant. So that's quite judicial. In all likelihood, he did enjoy judicial immunity. I think there is actually other Fifth Circuit law saying setting the bond rates is a judicial function.

THE COURT: Well, the judges were setting the bond, but then the other aspect of it is, it is collecting the bond, the bond moneys, and referring them to their own courts.

MR. CLINE: That's right. So that is what the statute was doing, though. The statute was taking the money that had been deposited and directing it to the court.

THE COURT: And the appellate court said that a way to get around even having to rule on judicial immunity in this action is simply to say that you can't do that, and that other statute should be changed, and they changed the statute. And there was never a ruling on judicial immunity.

MR. CLINE: That was despite judicial immunity.

THE COURT: But there was never a ruling on judicial immunity.

MR. CLINE: There was no ruling on it, though, because it wouldn't have changed things.

THE COURT: Okay.

MR. CLINE: Yes. I mean, so they could have assumed that they did enjoy judicial immunity and proceeded anyway to

that. That was the point that I was trying to make.

THE COURT: And that was the same point I was making just then, that there was no ruling on judicial immunity.

MR. CLINE: No ruling was necessary, though.

THE COURT: I understand what you are saying.

MR. CLINE: Okay. Thank you. Just making sure. Excuse me one second while I check my notes here.

I think that covers all of the issues that I was planning to discuss. Again, I think these two concessions within the framework of the test for judicial immunity, that four-factor test I mentioned, it is dispositive that the Chief Justice has never before appointed someone who has municipal court judge powers, who is that type of inferior court judge. As in *Davis v. Tarrant*, *Watts v. Bibb County*, *Lewis v. Blackburn*, those cases are all in accord. Those cases foreclosed the idea that an appointment is an appointment is an appointment. That would be inconsistent with what the Fifth Circuit was recognizing to be the law in that case.

And I think we have no dispute now that Section 1983 allows that declaratory relief claim regardless of judicial immunity. It is just a question of this adjudicatory capacity. And for the reasons I explained, under the case law, that requires an actual adjudication, findings of fact, determinations of law, and there is no such thing where you are looking to adjust the appointment of a municipal court judge or

CCID inferior court judge. Unless the Court has any other questions.

THE COURT: Thank you.

MR. NED NELSON: Your Honor, if I may, just to have a few short comments.

THE COURT: I'll give a few short comments.

MR. NED NELSON: Your Honor, I didn't come here -- we didn't come here prepared to relitigate and rehash arguments that have been submitted in June and July that were argued before the Court on June 14th and taken under submission and argued again at the end of June, June 29th, and submitted again in July. If I had known that was the case, we could be here a long time. There have been hundreds of pages of briefs and pleadings submitted, and we rest on those specifically.

Just a couple of the points, and I didn't follow all of the citations made by Mr. Cline. Again, and I know there was a number of cases cited, but I did want to point out that *Davis versus Tarrant County*, one of the only Fifth Circuit cases cited, the Fifth Circuit did not enter a declaratory judgment in that case. They disposed of that issue as being moot.

One of the cases cited by plaintiffs is *Caliste versus Cantrell*. Again, it is a Fifth Circuit case from 2019. That's one of the bail cases, bail setting and collection cases. That role of judges assumed in that case was not mandated by state law. It was a voluntary obligation assumed by the judge in

that case.

The number of cases out of the Eleventh Circuit, specifically from Georgia, dealing with nonlawyer magistrate appointments are the Mississippi equivalent of a special master. Those are qualified by those courts as being employees who answered directly to that judge in that case. I can't tell you everything about 1020 or the judges that it contemplates, but they are not the employees of the Chief Justice. They are judges within the definition of the statute. They don't answer day to day to the Chief Justice. The appointments are made by the Chief Justice.

All of the cases that talk about special appointments or appointments of trial judges, regardless of the qualifications or their jurisdictional qualifications, uniformly hold them to be judicial acts for purposes of immunity. I have nothing further, Your Honor.

MR. MARK NELSON: May I say something on that, Your Honor? Mark Nelson. I went back and looked at the amended complaint, proposed amended complaint, which is filed as Document 80-2, and as to my client, the Chief, Count 2 says that he intentionally discriminates against the majority-Black residents in violation of the Equal Protection Clause. Then Count 3 says that Mike Randolph, the Chief Justice, "discriminates against the majority-Black residents of Jackson as protected by the Equal Protection Clause." It is only a

four-count complaint.

Then we flip over to the prayer for relief, Your Honor, paragraph E, enjoining the Chief Justice from appointing anyone under Section 1. Then you go to paragraph J, and it says, enjoining the Chief Justice from appointing anyone under Section 4. There is no declaratory relief asked by the Chief Justice in this amended complaint. What it asks for is a relitigation of the injunction provisions that Your Honor has already addressed, that the Chief Justice is immune from that.

Now, I understand that my client wants to make a statement. Do you want to do that? May we have leave to --

THE COURT: Why don't you hold off on that. Just hold off on that. Thank you so much.

MR. MARK NELSON: May I answer any questions the Court may have?

THE COURT: No, no. Thank you very much.

(OFF-RECORD)

MR. LYNCH: Your Honor, if I may, for purposes of clarifying the record, Mr. Nelson got up and said that our complaint says that the Chief Justice potentially discriminates. That's not what it says in the part of the complaint. It says that HB 1020 discriminates. We don't say -- he misquoted what is in our complaint. And I want the record to reflect that.

THE COURT: All right. Thank you. Is there any

disagreement to his last statement?

MR. MARK NELSON: Yes, sir. I read from the complaint.

THE COURT: Pardon me?

MR. MARK NELSON: Yes, sir. I read from the complaint. I can do it again. It is in black and white in the motion for leave.

MR. LYNCH: Could you state the case again, please?

THE COURT: Let's get the record straight as to what it says.

MR. MARK NELSON: Page 51, Count 2, it says that -- Count 2 under Section 1983, "1020's packing of the Hinds County Circuit Court intentionally discriminates against the majority-Black residents of Jackson on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. (Defendants Chief Justice Michael K. Randolph and others, Greg Snowden, Liz Welch, and John/Jane Does 1 through 4)." That's on page 51.

On page 52 of Document Number 80-2, it says, Count 3, 42 U.S.C., Section 1983, "HB 1020's creation of the CCID court intentionally discriminates against the majority-Black residents of Jackson on the basis of race in violation of the Equal Protection Clause --

THE COURT: Slow down.

MR. MARK NELSON: I'm sorry. "(Defendants Chief

Justice Michael K. Randolph, Snowden, Welch, and John Doe)."

And then on page 58 is the prayer for relief, which begins on page 57, "Wherefore, plaintiffs respectfully request that this Court enter judgment in favor of the plaintiffs and against defendants, as follows."

Paragraph E (sic): "Preliminarily and permanently enjoin the Chief Justice from appointing any individual to become a temporary special judge of the Hinds County Circuit Court under HB 1020, Section 1."

Skipping over to page 59, at paragraph J: "Preliminarily and permanently enjoin the Chief Justice's appointment of any individual to become the CCID judge under HB 1020, Section 4." That is what I wanted to point out to the Court.

MR. LYNCH: Judge, I think it is clear now that we said that the statute does the discriminating, and we named the people that we need relief from to alleviate that discrimination. We are not saying that they personally are discriminating. They are the executors of the statute, and that's why they are in there.

I don't know why the Chief Justice keeps wanting to insist that we are making allegations against him that we haven't made. We have made some allegations against him, but these are exaggerations.

MR. MARK NELSON: Your Honor, I will let that pass.

THE COURT: All right. The complaint itself is of

record, and any inquisitive soul can read the complaint.

Now, then, with regard to these matters that we have heard today, this Court intends to write an opinion as fast as possible. The opinion is going to be released on or before Wednesday week. And I'm hoping that all of us are available a week from Wednesday. We wanted to do it a week from Tuesday, but I have another hearing that cannot be moved on that Tuesday.

But on that Wednesday that we will congregate again, if that's okay -- if not, please tell my courtroom deputy when we all can be present -- the first thing I want to start with will be the status of the Chief Justice in this lawsuit. I have some determinations that I have rendered that I'm writing up that's going to address his presence in this lawsuit for all purposes, and I then will make that known at the next time we meet. If it is Wednesday by our calendar, that is fine. I can't do it Tuesday, but if there's some conflict with all of these schedules, then we will find some time to do it, but I would like to do it as fast as possible.

So then I ask next Wednesday at 9:30, are we available? Anyone has a problem?

MR. SHANNON: Is that Wednesday the 13th you are referencing?

THE COURT: Yes.

MR. SHANNON: Thank you, Your Honor.

MR. NED NELSON: Your Honor, the Chief Justice and counsel are available next Wednesday, the 13th.

THE COURT: Okay. Anybody who cannot be available?

MR. LYNCH: I'm sorry. Is it both Wednesday and Thursday?

THE COURT: Just Wednesday.

MR. LYNCH: Just Wednesday. That's fine.

THE COURT: All right. Just Wednesday the 13th.

MR. CLINE: Your Honor, may I check my personal calendar? I believe I may have --

THE COURT: Do so.

MR. CLINE: Thank you, Your Honor. No conflicts on my end.

THE COURT: Anybody? All right. Failing to see any conflict hands, then we will go forward on the 13th at 9:30. And so I will see you then.

But as I said, at that time, when I start off our session, I intend to address the status of the Chief Justice in the lawsuit. Then I will have other matters that we will take up that I didn't get a chance to get to today, but I'm just pointing out those things are going to occur on the 13th.

I do not need any additional submissions. The Court has enough already and has read them, and at this juncture, it would probably be redundant.

Thank you very much for those you have submitted because

they have been very, very, very helpful. Thank you much. I will see you then on the 13th.

(HEARING CONCLUDED)

CERTIFICATE OF COURT REPORTER

I, Teri B. Norton, RMR, FCRR, RDR, Official Court Reporter for the United States District Court for the Southern District of Mississippi, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings reported by me using the stenotype reporting method in conjunction with computer-aided transcription, and that same is a true and correct transcript to the best of my ability and understanding.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

S/ Teri B. Norton
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